TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1907

No. 238

(20,288.)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1907.

No. 53.

THE WATER, LIGHT & GAS COMPANY OF HUTCHINSON, KANSAS, APPELLANT,

vs.

THE CITY OF HUTCHINSON ET AL.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KANSAS.

INDEX.

	Original.	Print.
Citation and acceptance of service	1	1
Bill of complaint	2	1
Ordinance No. 651	13	9
Ordinance No. 402	23	15
Precipe for chancery subpœna	35	23
Chancery subpœna	36	23
United States marshal's return thereon	37	24
Proof of service of notice of application for injunction	38	25
Agreement pending application for injunction	40	25
Appearance of defendants	41	26
Amended bill of complaint	42	27
Ordinance No. 402	59	37
Ordinance No. 651	71	45
Demurrer to amended bill	82	51
Memoranda of decision	84	52
Decree	97	63
Assignment of errors	99	64
Petition for appeal	101	65
Appeal bond	102	66
Order allowing appeal	106	68
Clerk's certificate to record	107	68

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JUNE 27, 1907.

1 UNITED STATES OF AMERICA, *ss:*

To the defendants, The City of Hutchinson, J. P. Harsha, Mayor, J. E. Hostutler, L. A. Beebe, M. I. Hults, C. W. Oswald, F. G. Delano, John Blair, W. E. Long, W. S. Thompson, C. Howard, F. M. McDermed, C. O'Neal, & C. I. Parks, S. F. Johnson, City Clerk; Emerson Carey, K. E. Sentney, C. M. Williams, C. H. McBurney, A. W. Smith and J. S. George:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the 2 Monday of Oct., 1906, pursuant to an appeal filed in the Clerk's office of the Circuit Court of the United States, District of Kansas, Second Division, wherein The Water, Light & Gas Company of Hutchinson, Kansas, is appellant and The City of Hutchinson, J. P. Harsha, Mayor, J. E. Hostutler, L. A. Beebe, M. I. Hults, C. W. Oswald, F. G. Delano, John Blair, W. E. Long, W. S. Thompson, C. Howard, F. M. McDermed, C. O'Neal and C. I. Parks, S. F. Johnson, City Clerk, Emerson Carey, K. E. Sentney, C. M. Williams, C. H. McBurney, A. W. Smith and J. S. George are respondents, to show cause, if any there be, why the judgments in said appeal mentioned should not be corrected, and speedy justice should not be done to the parties on that behalf.

Witness, the Hon. Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 15 day of March, in the year of our Lord, nineteen hundred and six.

JOHN C. POLLOCK,
Circuit Judge.

For and in behalf of the Defendants named above *I* do accept service of this Citation & do enter the appearance of said Def'ts.

PROGG & WILLIAMS,
Solicitors for Def'ts.

[Endorsed:] No. 1101. Citation. Filed M'ch 15, 1906. Geo. F. Sharitt, Clerk, By J. F. Shearman, Deputy Clerk.

2 In the Circuit Court of the United States for the District of Kansas, Second Division.

THE WATER, LIGHT & GAS COMPANY, a Corporation, Complainant,
v.
J. P. HARSHA, Mayor; J. E. HOSTUTLER, L. A. BEEBE, M. I. HULTS, G. W. OSWALD, F. G. DELANO, JOHN BLAIR, W. E. LONG, W. S. THOMPSON, C. HOWARD, F. M. MCDERMED, C. O'NEAL, and C. I. PARKS, Councilmen, and S. F. JOHNSON, City Clerk, and EMERSON CAREY, K. E. SENTNEY, C. M. WILLIAMS, C. H. MCBURNEY, A. W. SMITH, and J. S. GEORGE, Defendants.

To the Honorable the Judges of the above Court:

The Water, Light & Gas Company files its bill of complaint against the above named defendants, and complains and alleges:

First. That complainant is a corporation, organized under the laws of the State of New Jersey and is a citizen of New Jersey and duly authorized to do business in the city of Hutchinson, Kansas; that the said city of Hutchinson is a corporation organised under the laws of the State of Kansas, and is a city of the second class in said State; that J. P. Harsha is mayor, and J. E. Hostutler, L. A. Beebe, M. I. Hults, G. W. Oswald, F. G. Delano, John Blair, W. E. Long, W. S. Thompson, C. Howard, F. M. McDermed, C. O'Neal and C. I. Parks are councilmen of said city, and S. F. Johnson is clerk of said city, all citizens of Kansas, and residing in said city; that Emerson Carey, K. E. Sentney, C. M. Williams, C. H. McBurney, A. W. Smith and J. S. George are citizens of Kansas in said city.

Second. That in the year 1885 the said city of Hutchinson granted to J. S. Drake or the Holly Water Works citizens of New York, and M. C. Orton, a citizen of Chicago, a franchise to build and operate a waterworks in said city, and extend pipes and mains through its streets, alleys and public places for the purpose of supplying
3 the said city and the inhabitants thereof with water for a term of twenty years. It also contracted with said J. S. Drake and C. M. Orton and assign- that they would furnish water for the extinguishment of fires at the sum of $68, per annum for each hydrant, and on the strength of said franchise and contract said J. S. Drake and C. M. Orton and assigns erected waterworks, placed therein valuable machinery, and extended pipes and mains through the streets of said city, put in hydrants as required, and furnished to the city and its inhabitants water at prices fixed in said franchise and contract made with the city, and made extensive and valuable betterments of the waterworks from time to time for the purpose of furnishing good service to the city, a copy of which franchise and contract will be filed with the clerk and made an exhibit.

Third. That in the year 1886 the said city of Hutchinson granted a franchise to J. S. Drake and C. M. Orton, citizens of New York and Illinois, partners as Drake & Orton, by which they were given the right to construct and operate an electric light plant in the city of Hutchinson, erect poles and extend wires and other appliances into and through the streets and alleys and other public places in said city for the purpose of furnishing the city and its inhabitants with electric light for lighting, heating and other purposes, and after receiving said franchise the said parties and assigns did erect a light plant in said city, placed in it valuable machinery, and extended their poles and wires throughout the city so as to furnish electric light and power to said city and its inhabitants, and some time later the city agreed with said parties and their assigns to take thirty-five arc lights at $100 each per annum for a specified length of time. Copies of said franchise and contract will be filed with the clerk.

Fourth. That on the 15″ day of September, 1885, the city of Hutchinson granted to the Inter-State Gas Company, a cor-
4 poration organized under the laws of and a citizen of the State of Missouri, but doing business also in Kansas, a franchise to erect a gas plant and extend gas mains in connection therewith throughout the said city for the purpose of furnishing said city and

the inhabitants with gas, light, heat and power, the said franchise being for a period of twenty-one years, and also made a contract with said Gas Company or assigns to take a certain number of gas lights for street purposes, which number your orator cannot now state, but the same will be set out definitely in the exhibit filed with the clerk. On the strength of said franchise and contract said company erected a valuable gas plant in the city, extended its mains and pipes throughout the streets and alleys of said city in order to furnish said city and its inhabitants with gas for light, heat and power, and did furnish the said city and its inhabitants with gas for such purposes.

Fifth. That on the — day of ——, the Hutchinson Water, Light & Power Company, a corporation organized under the laws of the State of Kansas, with the knowledge and consent of the city, purchased from the above named persons and corporations all their properties, franchises and contracts with the said city, and became the owners thereof. That after said date the said Water, Light & Power Company continued to make large investments and expenditures in said city in order to furnish the said city and the inhabitants thereof with excellent water, electric light and gas service; that prior to the 5" day of March, 1897, the city had become indebted to the said Hutchinson Water, Light & Power Company for hydrant rentals and for electric light in the sum of more than $12,000, and had also become dissatisfied with the contracts of said company by reason of the price it was paying for hydrant rentals and light service, but made no question as to the manner and character of the service performed, nor did it dispute the validity of said franchises and contracts, whereupon about said date the said city by its mayor and council made known to the Hutchinson Water, Light & Power Company that if the said company would remit a portion of the indebtedness due it from said city and also reduce the price of hydrant rentals and surrender its old contracts therefor, and give the city the right to purchase its water light and gas plants at the expiration of ten years the city would be pleased to grant to it a new or substituted franchise to erect, own, maintain and operate gas works, water works, and electric light works in said city for the purpose of supplying the city and its inhabitants with water, light and power. In order to induce the Water, Light & Power Company to make the great concessions requested the said mayor and council represented that if the Water, Light & Power Company would make the said concessions that its right to operate water, electric light and gas plants should be exclusive in said city for the space of twenty years, provided that the city should have the right to purchase the said plants with their franchises, contracts, business and good will at any time after the expiration of ten years, paying therefor a reason- sum to be fixed by the parties, and if they could not agree, by a court of competent jurisdiction, and also provided that any street railway company in the meantime should have the right to furnish its own power as it saw fit; also that the city could effect any other means it saw fit in the meantime to furnish

its own water for sprinkling streets, flushing sewers, and also that the inhabitants of said city should have the right to procure by means of their own water, electric light or gas for their own individual private purposes. The Water, Light & Gas Company, though sorely pressed for money on account of the magnitude of its investments and the hard times it had gone through from 1893 to 1897, concluded to accept the proposition of said city upon their assurance that it would observe, on account of the great benefits conferred, the contract which it proposed to make with the Water, Light & Power Company: Thereupon the said city enacted an ordinance No. 402, a copy of which is attached hereto and made a part hereof, marked "Exhibit A," and the same was accepted by the Water, Light & Power Company. There was outstanding at this time a dependent contract fixing the number and price to be paid for arc lights
6 and it was agreed that dependent contract, which had a few years to run, should stand.

Sixth. Your orator avers that pursuant to its agreement with the said city at the time ordinance 402 was enacted, and in consideration therefor, it remitted to the city $6,600 in cash on the $12,600 due it from said city. It also reduced the annual hydrant rental in a contract which had eight years to run from $12,600 to $6,000 per annum, and reduced the price to be charged for additional hydrants from $60 to $30 per annum, making a total, if not more than, $50,000 in cash. It gave the city the right to purchase the electric light and gas plants as well as the water plant at the end of ten years, which it did not possess before.

The said Water, Light & Power Company on the strength of said ordinance continued to make large investments in the way of improving and benefitting its plant in said city and extending the service as required by the city and its inhabitants, and in the year 1900 when the dependent contract fixing the number and price of electric lights referred to in said ordinance 402 expired it made a new dependent contract with said city in which the number of arc lights to be furnished were fixed at fifteen all night lamps and about 25 half night lamps, and at the special instance and request of the city, at its own expense, constructed a second circuit in order to furnish the all and half-night lamps. It also reduced the price of the all-night lamps from $100 to $83.33 per annum and made corresponding prices for the half-night lamps. Said last named dependent contract, which was made for five years, ran out August 20th, 1905.

Seventh. Your orator further avers that on or about the — day of ——, after a full investigation of the history and relationship of the Water, Light & Power Company to the city of Hutchinson, the character of its franchise and contracts, and the consideration paid at the time said ordinance 402 was passed by the city, and after written legal advice that the conditions and provisions therein contained would be and should be observed by the city of Hutch-
7 inson, it purchased from the said Water, Light & Power Company all of its real and personal property, its franchises,

contracts, good will and business in said city of Hutchinson with the full knowledge and assent of the said city of Hutchinson and became the absolute owner of the same and ever since has been treated by said city as a substitute, as it became in fact, of the aforementioned Water, Light & Power Company, and from that date has continued with the assent of the city to furnish water, light, heat and power from its waterworks, its electric light works and its gas works, according to the terms and conditions prescribed in said ordinance 402, with such qualification and details as were mutually assented to by the city, and your orator says that within said time the said Water, Light & Gas Company at the instance of said city has put in additional hydrants, rerouted and extended its water mains and pipes, changed the locality of street lights, rebuilt its gas plant, added to its water and electric light plants and performed many acts at the direction and command of the city, and has spent large sums of money in the betterment of its said plants and in extending their capacity and has not only improved the character and manner of the service extended to said city and its inhabitants, but as a matter of fact has reduced the price of water and gas to the inhabitants of said city; that the prices fixed and prices charged for service are as reasonable, all things considered, as those of any other water, electric light and gas plants in the State of Kansas. And all the above was done on the faith and strength of said franchise and contracts and the belief that the city was bound by same.

Your orator avers that all these things it did in current succession notwithstanding the fact that its properties were greatly injured by destructive floods at the city of Hutchinson in the years 1903, 1904, and 1905.

Eighth. Your orator further avers that on the strength of the franchise and contract in force between the city of Hutchinson and the Water, Light & Power Company it has made executory
8 contracts of many thousands of dollars for machinery and material with which it expects to further equip its plant.

Ninth. Your orator further says that some time ago, in order to better the lighting service in the streets of said city it substituted the enclosed arc lamp for the old open lamp. This work was done in the presence of the city officials and the city received the service from the new lamps, and although the contract with your orator did not specify whether the lamps should be open or enclosed, suddenly after the change was made the city objected to the bill of complainant on the ground that the new lamps were less valuable than the old and refused to pay its light bills unless *un*reasonable deduction was made by complainant. Your orator was unable to make any settlement with the city although it offered to arbitrate or submit to an expert, or to have the dispute determined in a friendly suit as to the respective value of the lamps. At first the city simply held up the light bills, but later without any objection or question of dissatisfaction with complainant it refused to pay also the water bills of complainant until the amount now due and unpaid from the city to complainant is nearly $16,000.

Your orator avers that the dependent contract fixing the number and value of lights expired August 20", 1905, and the mayor and council of said city ordered your orator absolutely to turn off and cease lighting the streets at said date. Your orator offered to furnish the city light on any reasonable contract, or on *quantum meruit* if the city desired no contract, after said date and asked a modification of the order to turn off the lights but the city was inexorable and finally after running the lights for several months at a loss of several hundred dollars as it can probably get no pay for the lights after the order to cease was given and insisted on by the city, your orator felt it was compelled to and did turn off the said lights, but is ready to turn them on again at any time the city will permit.

9 Tenth. Your orator avers that it quickly ascertained the facts of the policy of the mayor and council in leaving the city in darkness as aforesaid, and that it was to discom-ode and aggitate the public in order to promote a scheme by which other persons might seek franchises and contracts covering the same ground as those of your orator. The facts were as follows: The mayor of the city, J. P. Harsha, and councilman L. A. Beebe, who is chairman of the light committee, chiefly dominate the policy of the city council in regard to your orator. There is in the city of Hutchinson an old horse car line and the same has been for sale for a long time at the sum of $8,000. Your orator is informed and believes that the broker or agent having the same for sale on commission is the said L. A. Beebe and that the mayor was anxious that someone buy this line, organize a company and obtain contracts and franchises from the city, not only to operate a street car line, but also to operate an electric light works and to furnish the city and its inhabitants with electric light. Thereupon a scheme was elaborated, headed by defendant C. M. Williams, who is the special counsel for the city and the confidential attorney of the other defendants herein as follows: That certain parties in the city of Hutchinson would associate themselves together for the purpose of buying the street car line, and buy it, and afterwards organize a company; that in the meantime these persons would elect trustees, so to speak, to represent them in the scheme until they could organize a company, and these trustees, so to speak, consisting of the special attorney of the city aforesaid, and others, should seek and obtain from the city franchises to operate electric light and gas works in said city to furnish the city and its inhabitants with light, heat and power as well as to operate a street car line, and then afterwards, either for themselves or for the company which they were promoting seek profitable contracts to light the streets and alleys of the city of Hutchinson from a friendly mayor and council and obtain the same probably without any notification as to the number or character of the lights or the service to
10 desired to your orator and without permitting your orator to compete on the price of the lights and the service to be obtained. Your orator avers that J. P. Harsha is one of the persons who is into the scheme and originally agreed to take $2,000 of

stock in the proposed company and your orator avers upon information and belief that he is still interested in the enterprice, having $2,000 of stock in the name of a business associate J. S. George. Your orator further avers upon information and belief that W. S. Thompson, one of the councilmen, is into the scheme and actively solicited subscriptions for the stock of the proposes company and was an agent for that purpose and your orator avers and believes that L. A. Beebe is also into it, at least to the extent of claiming a commission on the sale of the horse car line; that as part of the scheme Emerson Carey, K. E. Sentney, C. M. Williams, O. H. McBurney, A. W. Smith and J. S. George, the latter being a business associate of the mayor, were elected or nominated agents or trustees for the said promoters; that the said horse car line was purchased on time with the exception of $2,000 which was paid by Emerson Carey and C. M. Williams, and that immediately after the organization of the scheme, to-wit, December 15", 1905, the mayor and councilmen of the city of Hutchinson met in special session with no notice to the public or to your orator, and so far as your orator is informed with no one present but the said trustees excepting city officers they passed an ordinance suggested and drawn by said C. M. Williams; that all objections to the haste and secrecy of the proceedings were overruled and the measure was passed in effect as prepared by said C. M. Williams, although your orator is informed and believes that two members of the council were not in the city and were not notified of the meeting. A copy of the franchise passed is made a part hereof and marked "Exhibit —."

Your orator is informed and believes that the petition or paper signed by the persons who are to take stock in the enterprise
11 has in it a proviso that the city of Hutchinson shall vote $20,000 worth of bonds for the building of the street car line, and probably has another provision that unless the citizens of said city will subscribe a sum sufficient practically to build the line the contract shall not be binding. Your orator does not have a copy of said petition and therefore cannot attach same hereto.

Your orator avers on information and belief that it is only a question of time when the city will be asked to make a large and favorable contract for street lights to said defendants or trustees mentioned herein, or their assigns, and is sure that unless restrained by process the said matter is liable to occur at any time; that through the influence of said L. A. Beebe, O. M. Williams, W. S. Thompson, and J. P. Harsha, the said city council can be called into special meeting at any time of the day or night and act without the giving of any public notice in advance or notice to your orator. Your orator avers that in addition to the franchise already passed granting said rights to said defendants and their assigns a contract for lights will injure not only the contract rights of your orator but the value *and* of its other investments and injure its credit and reputation.

Your orator avers that it has no objection to the formation and operation of a street railway line by electricity or other power but would be glad to promote the same in any reasonable way, however

it does object to the city, after the numerous advantages and concessions contained in said ordinance 402 attempting to ignore the obligations and rights therein specified, and attempting to bankrupt your orator whose property is of such a description that it cannot remove it from the city of Hutchinson.

Your orator further avers that the action already taken by defendants, and that which it has every reason to believe and avers will be taken, will cause your orator irreparable damage for which there is no adequate relief at law.

Wherefore your orator prays that a subpœna issue and be served upon def'ts above named as def'ts; that your Honors grant
12 unto it a writ of injunction commanding the defendants and all persons claiming to act under their authority and direction to absolutely refrain and desist from doing any acts under the said franchise granted to defendants as aforesaid which will affect the exclusive rights of your orator to furnish the said city and its inhabitants with electric or gas light for lighting and hearing purposes or power except for street cars and also from making or proceeding to make any contract for furnishing light to the city of Hutchinson and its inhabitants or furnishing gas to the city of Hutchinson and its inhabitants until the expiration of the contracts and franchise of your orator with said city.

And your orator also prays for such other and further relief as may be equitable and just, and particularly that a temporary order of restraint or injunction issue against said defendants, until the final determination of this suit, and that thereupon the said temporary injunction may be made perpetual.

FRANK DOSTER,
H. WHITESIDE,
FAIRCHILD & LEWIS,
Solicitors for Complainant.

STATE OF KANSAS, *Shawnee County, ss:*

H. Whiteside, being duly sworn, on oath says, that he is agent of the complainant in the above bill of complaint and duly authorized to verify the allegations of the within and foregoing bill of complaint filed by complainant; that said complainant is a corporation and a non-resident of the State of Kansas; that affiant is familiar with the facts stated in the within and foregoing bill of complaint, and that all the material facts stated in said bill are true in substance and in fact.

H. WHITESIDE.

Subscribed and sworn to before me this 20 day of Dec. 1905.

GEO. F. SHARITT, *Clerk.*

My commission expires ——.

13 Published Dec. 19, 1905.

Ordinance No. 651.

An ordinance granting permission and authority to Emerson Carey, K. E. Sentney, C. M. Williams, C. H. McBurney, A. W. Smith and J. S. George, their successors or assigns, to construct and operate a Street Railway in and along the streets and avenues of the City of Hutchinson, Reno County, Kansas, and to construct, operate and maintain an electric plant for the purpose of furnishing electric current for electric lights and power and for all other purposes for which electric current may be used, and to construct, operate and maintain a gas plant for heating, lighting and fuel and for all other purposes for which gas may be used and prescribing certain regulations and relations thereto.

Be it ordained by the Mayor and Councilmen of the City of Hutchinson, Kansas:

SECTION 1. That consent, permission and authority are hereby given and granted to Emerson Carey, K. E. Sentney, C. M. Williams, C. H. McBurney, A. W. Smith and J. S. George, their successors or assigns, to construct, run and operate for a period of fifty years from and after the publication of this ordinance, a single or double track street railway, with all necessary side-tracks, turnouts, switches and curves in and along the streets and avenues mentioned in Section 12 of this ordinance and upon such other streets and avenues of said city for which the City Council may hereafter grant permission, or where the owners of a majority of the front footage between the terminal points of the tracks upon such streets and avenues shall consent in writing to this Council to the construction and operation of a Street Railway thereon and to keep, maintain and operate thereon Street Railway cars and carriages in the manner and in accordance with the conditions and provisions hereinafter set forth.

SEC. 2. Such railway shall be operated by electric, overhead trolley system, or what may become the best method of electric propulsion.

14 The erection of all poles, wires and other devices of said grantees in the streets and avenues of said city for any of the purposes provided in this ordinance shall be made under the direction of the Committee on Streets and Alleys and said grantees shall remove and relocate any such poles, wires or other devices in any of the streets and avenues of said city whenever the Council shall, by resolution, demand such removal and relocation.

SEC. 3. The cars used on such street railway shall be first class in style and finish and shall be used to transport passengers and their ordinary baggage, mail, express matter, farm produce and such freight as can be conveniently handled and the common council of said city shall have the power hereafter to make such regulations for the running of such cars and the time of service thereof as the public safety and convenience may require and provide penalties for the violation thereof, provided that such regulations shall not require

the running of a car over any street thereof oftener than thirty minutes, except Main street, between the hours of 6 a. m. and 10 p. m.

SEC. 4. The track of such street railway shall be constructed on the center or side of the streets and avenues of said city, as the City council may direct and so as to conform to the established grades thereof, and so as not to unnecessarily obstruct or impede the free passage of such streets. Said City Council shall upon the request of the grantees herein, their successors or assigns, establish the grade of any street or avenue where none exists and said grantees, their successors or assigns shall then conform their railroad tracks to such grades. Said grantees or their successors or assigns shall upon request of this Council keep the space between its rails, turnouts and switches upon the streets of the city, free from dirt and filth and upon a failure to do so said Council shall have the right to cause or procure the same to be done and to collect the costs thereof from the said grantees, their successors or assigns. In case of the change of the grade of any street after said grantees shall have laid their tracks upon the same, any damage sustained by said grantees, their successors or assigns, by reason thereof shall be assessed by Commissioners and collected and paid to said grantees, their successors and assigns, the same as other damages in such matters are assessed and collected.

SEC. 5. The track of such street railway shall be of uniform gauge, four feet, eight and one-half inches in width, and shall be constructed of a most approved "T" rail of such weight and pattern as not to interfere with paving up to the rails with any of the approved materials for modern paving. The face of the rails shall not be to exceed one-half inch above the surface of the pavement. The poles for overhead wires may be 35 feet high but must be straight, smooth and painted—the first seven feet black, balance white.

SEC. 6. The City Council of said city shall have the power to order and require any track or tracks of such street railway to be moved or set over whenever it shall be necessary for the purpose of grading, improving or repairing any street, alley or avenue in said city, or for the purpose of constructing or repairing any sewers or laying or repairing any gas or water mains or pipes; provided, that when such track shall be so moved, or set over on said streets at the request and for the accommodation and benefit of any person, company or corporation, such person, company or corporation shall pay the cost and expense thereof; provided, however, that no part thereof shall be chargeable to said city.

SEC. 7. The grantees herein, their successors or assigns shall be liable for all legal and consequential damages which may be sustained by any person by reason of the carelessness, negligence or want of ordinary care by said grantees, their successors or assigns or any of their agents or servants in the course of their employment.

SEC. 8. The rate of fare between the hours of 6 a. m. and 11 p. m. shall not exceed 5 cents per passenger for one continuous passage from any point on any of grantees' said railway line to any other

point thereon in the city limits, provided that such continuous
16 passage shall be via the short line between starting point and destination and provided, that when there is no through car between the passenger's starting point and destination, then such passenger shall be entitled to free transfer good on such car going to such destination; provided, further, that after 11 o'clock p. m. said fare may be 10 cents.

SEC. 9. The cars of such street railway shall be run in accordance with the following rules and regulations:

1. No car shall be run faster than the following rate of speed, viz.: On Main Street, between Avenue F and Fifth Avenue, ten miles per hour, and fifteen miles per hour on any other portion of the line within the city limits.

2. Cars driven in the same direction shall not approach each other nearer than fifty feet, except in case of accident or when at or near station.

3. No car shall remain standing on any street unless attached to its power and in waiting for passengers.

4. No car shall be stopped on cross-walk nor in front of any intersecting streets, except to avoid collision or damage or injury to persons or property, or to take on or let off passengers.

5. Conductors and motormen of cars shall use care and diligence to prevent injury to persons and upon appearance of danger to any person in or near the tracks the cars shall be stopped.

6. All proper care shall be used by conductors and motormen to prevent injury to teams, carriages, buggies, wagons and other vehicles.

7. It shall be lawful for any street car conductor or motorman or agent of said grantees, their successors or assigns, to eject from the cars any person acting in a rude, insolent, boisterous or drunken manner upon any of their cars, or any other property, or may call to their aid any of the police force in the city to arrest any person so offending.

8. In case of fire, cars shall be stopped when so ordered by the chief of the fire department of said city, or by any of his assistants.

17 SEC. 10. The cars of the said grantees herein, their successors and assigns shall be entitled to the track and when any team or vehicle shall meet or be overtaken by such cars, such team or vehicle shall give way to such cars, except that of funeral processions and public parades while crossing said tracks shall be entitled to preference over such cars.

SEC. 11. As respects the permission and authority hereby granted to construct and operate such street railway, said grantees, their successors and assigns shall construct and operate the same at their own risk and in no case shall the City of Hutchinson be held responsible to said grantees their successors or assigns, or to any person or property owner of said city for any damages arising from the granting of the privileges herein set out or from the construction or operation of such street railway.

SEC. 12. The grantees herein, their successors or assigns shall

construct and operate the following lines of street railway on the following routes to-wit:

Main street, from Avenue F to the city limits upon the north, Avenue A east to Bismark street, and may construct and operate said road upon said Avenue A east to city limits and from said Avenue A upon any street most feasible to the cemetery and to the State Industrial Reformatory. And shall operate the same upon Fourth avenue from Main street to Cleveland street, and may operate the same upon Fourth avenue to the city limits.

SEC. 13. As a condition precedent to the vesting in the said Emerson Carey, K. E. Sentney, C. M. Williams, C. H. McBurney, A. W. Smith, J. S. George, their successors and assigns of the rights and privileges confer-ed by this ordinance, said grantees, their successors or assigns, shall, within thirty days make and file with the Clerk of the City of Hutchinson, written acceptance of the provisions of this ordinance.

SEC. 14. The said grantees, their successors or assigns shall have the right to lay "T" rails on the streets and avenues of the
18 City of Hutchinson as named in this ordinance and all streets used by said grantees, upon the following conditions and restrictions:

That the said grantees, their successors and assigns shall fill up the space between the rails and between turn-outs and switches with good packing dirt or gravel and to the distance of one foot on each side of the tracks so that the level of the ground shall be within half inch of the top of the rails, said ground being packed firmly so as to make a good, hard roadway and easy to cross with teams and vehicles and in paved districts, to restore pavement to the condition it was in before the laying of the rails. Surface of the rails to be kept not to exceed one-half inch above the pavement and if said city shall deem it necessary, said grantees, their successors and assigns shall plank street and alley crossings in accordance with the order of the council and in case said grantees, their successors and assigns shall fail to perform any of the restrictions, provisions and conditions herein enumerated, the city may perform the same and recover cost thereof from the said grantees, their successors and assigns.

SEC. 15. In consideration of the benefits to be derived and to accrue from the construction and operation of such street railway in the City of Hutchinson, said grantees, their successors and assigns are hereby relieved and exempted from the payment of any and all license or license fees which otherwise might be levied or imposed by the council of said city.

SEC. 16. If the said grantees, their successors or assigns or any of their agents or representatives shall violate any of the provisions of section 9 of this ordinance, they shall be fined not less than $1.00 nor more than $50.00 for each offense.

SEC. 17. If the said grantees, their successors or assigns shall fail, neglect or refuse to operate said street railway system over any of its tracks for a period of ninety days at any one time after written notice from the City, Council so to do, then all rights of said grantees,

their successors and assigns to and over any street in which they may fail to operate their said cars, may be forfeited by the council of said city; provided this section shall have no application if the failure to operate said railway shall be caused by strikes, riots or other causes not under the control of the city.

SEC. 18. The grantees, their successors and assigns shall keep and maintain their general offices, repair shops of said railway in the City of Hutchinson, Kansas.

SEC. 19. It is understood that the grantees herein, or persons whom they represent has purchased the franchise including all rights and privileges of the Hutchinson Street Railway Company, and as a condition precedent to the exercise by said grantees, their successors and assigns of this within franchise, the said grantees, their successors and assigns are to procure the surrender of the franchise of the Hutchinson Street Railway Company, together with all rights and privileges confer-ed thereunder to the City of Hutchinson, or shall file with the City of Hutchinson a written evidence of the transfer by the Hutchinson Street Railway Company to the grantees, their successors and assigns all the rights and privileges conferred to the said Hutchinson Street Railway Company by the City of Hutchinson, it being intended that the franchise and privilege herein granted shall in no way interfere with the franchise and privilege heretofore granted to the Hutchinson Street Railway Company, so as to render the City of Hutchinson liable for any damage by reason of any conflicting rights between the grantees herein, their successors and assigns and the said The Hutchinson Street Railway Company by reason of the rights and privileges herein granted to the grantees, their successors and assigns.

SEC. 20. The said grantees herein, their successors and assigns, shall commence the construction of the electric railway hereinbefore designated, located and described within six months from the date of the publication of this ordinance, and shall have the same completed and in actual operation in said city within one year, provided that if said construction be not commenced within said time and if said line be not completed and in operation within said one year, then this ordinance shall without further action become inoperative and void and all rights and privileges conferred by this ordinance shall revert to said City of Hutchinson, Kansas, unless upon good cause, said city may by resolution grant further time for the extension of said work.

SEC. 21. There is hereby given and granted to the said Emerson Carey, K. E. Sentney, C. M. Williams, C. H. McBurney, A. W. Smith and J. S. George in connection with the privileges and rights conferred in the above and foregoing section, the further right and privilege for the term of twenty years from the date of the passage and approval of this ordinance of supplying the City of Hutchinson, Reno County, and the inhabitants of said city and county with electric current for electric light and power and for all other purposes for which electric current may be used and for such purpose said grantees are here authorized and permitted to erect poles and wires through all the streets, alleys, lanes, and public grounds and

to cross any stream or bridge in said city to erect and maintain all engines, machinery and other appliances necessary for the conducting of said work and for the supplying of said city, said Reno county and the inhabitants of said city and county with electric light and power.

SEC. 22. The said grantees herein their successors or assigns shall not at any time use the poles, wire and other appliances provided for in this ordinance in such a manner as to hinder or obstruct the commerce or trade of the City of Hutchinson, nor obstruct the proper use of the streets, alleys, lanes, avenues, public grounds or other public places excepting as may be necessary temporarily to make repairs, or extensions or improvements to its property and works.

SEC. 23. That in addition to the rights and privileges heretofore granted, there is granted to said Emerson Carey, K. E. Sentney, C. M. Williams, C. H. McBurney, A. W. Smith and J. S. George, their successors and assigns, the further right and privilege
21 for the term of twenty years from the date of the passage and approving of this ordinance of supplying the City of Hutchinson, Reno County, Kansas, and the inhabitants thereof with gas, either manufactured or natural and for such purpose shall have the right and privilege to construct and maintain mains, pipes and other conduits in the streets and alleys of said city.

SEC. 24. That the grantees herein their successors and assigns, in laying the mains and pipes in the streets and alleys in said city shall lay the same below the surface of the ground and shall suitably guard and protect all excavations for such purpose so as to prevent injury to person and property by reason thereof.

SEC. 25. That the excavation made by reason of the laying of such pipes and mains after the same shall have been laid, shall be carefully filled and replaced in as good condition as before and as soon as possible thereafter as the circumstances will permit.

SEC. 26. That the said grantees, their successors and assigns shall not, at any time so construct any of their electric light wires and poles and other appliances or their gas mains or pipes in such a manner as to hinder or obstruct commerce or trade of the city, nor obstruct the proper use of the streets, alleys, lanes, or other public grounds of said city, excepting as may be necessary to temporarily make repairs, extensions or improvements to its work.

SEC. 27. The said grantees herein, their successors and assigns shall at all times repair and make good any injuries which it may create in the erection, construction and maintenance or operation of the several works provided for in this ordinance to any of the streets, alleys, lanes, public grounds or other public places under the control of the city, or any sidewalks, gutters, or other improvements in the streets, alleys and avenues of said city.

SEC. 28. The City of Hutchinson hereby agrees that it will pass all necessary ordinances for the protection of the property of the said grantees herein, their successors and assigns of their street railway and its machinery, electric works and gas works, and to
22 prevent interference with the poles and wires, or the convenient construction, maintenance and operation of the same.

SEC. 29. This ordinance shall be in force and take effect from and after its publication once in The Hutchinson News.

Approved December 15, 1905.

J. P. HARSHA, *Mayor.*
Mayor.

Attest:
S. F. JOHNSON,
City Clerk.

23

Ordinance No. 402.

Published in the Hutchinson News, March 17, 1897.

An ordinance to provide for a system of water works, electric light works and gas works, and supply of water, electric current and gas to the city of Hutchinson, and the inhabitants thereof.

Whereas, The Hutchinson Water, Light and Power Company is the owner of certain exclusive franchises and contracts with the city of Hutchinson, under which and in accordance with which the said company has expended large sums of money in constructing and building water works, electric light works and gas works, and in building up the business of said works, which are now in successful operation in supplying the city of Hutchison and the inhabitants thereof with water, electric current and gas for all purposes for which water, electric current and gas is used; and

Whereas, The city of Hutchinson is desirous of modifying and changing said franchise and contracts to the advantage of said city of Hutchinson without cancelling or abridging any of the rights or privileges vested in said company by reason of its labor and investments under said franchises and contracts other than the modifications hereinafter specified.

Therefore, In consideration of the surrender of all the existing contracts and franchises of said company with the city of Hutchinson, excepting as hereinafter specified,

Be it ordained by the Mayor and Council of the city of Hutchinson, Kansas:

SECTION 1. That there is hereby given and granted to the Hutchinson Water, Light and Power Company, of Hutchinson, Kansas, its successors or assigns, the exclusive right and privileges for the term of twenty years from the date of the passage and approval of this ordinance of supplying the city of Hutchinson, Reno county, Kansas, and the inhabitants thereof, by a system of works with water for the prevention and extinguishment of fires and for all other purposes for which water may be used, (said water works to be the Holly system); with electric current for electric light and
24 power, and for all other purposes for which electric current may be used, except power for the operation of street railways, which exception shall not prevent said Water, Light and Power Company from furnishing electric currents to street railways for

any and all purposes; and with gas for lighting, heating and for fuel, and for all other purposes for which gas may be used, in accordance with the terms and conditions set forth in this ordinance.

SECTION 2. That said Hutchinson Water, Light and Power Co., its successors or assigns, is hereby authorized to maintain, extend and operate said works in or adjacent to the city of Hutchinson, to receive, take, store, purify, conduct and distribute said water, electric current and gas through said city, to construct and extend aqueducts, mains, pipes and erect poles and wires through all the streets, alleys lanes and public grounds and to cross any stream or bridge in said city, to erect and maintain all engines, machinery and other appliances necessary for conducting any of said works, and for supplying said city and the inhabitants thereof with water, electric current and gas for the purposes herein mentioned, and for such purposes the said Hutchinson Water, Light and Power Company, its successors or assigns, shall have the right, and is hereby authorized to use the streets, alleys, avenues, lanes and public grounds in or adjacent to said city, and shall have the right to take up any pavements or sidewalks, and made such excavations therein as may be necessary to lay, repair and maintain aqueducts, mains and pipes below the surface of the ground for conveying and distributing the water and gas, and for erecting poles for electric wires as aforesaid;

Provided, that the said Hutchinson Water, Light and Power Company, its successors or assigns, shall suitably guard and protect such excavations so as to prevent injury to persons and property by reason thereof, and

Provided further, that such excavations shall be filled and such pavements and sidewalks replaced in as good condition as before, and as soon as possible thereafter as the circumstances will permit.

SEC. 3. All water mains hereinafter ordained to be laid by the city shall be so located as to comply with the general plan of water distribution of the system so as to avoid dead ends as far as practicable, and on all such extensions of water mains ordered by the city council, the said Hutchinson Water, Light and Power Company, its successors or assigns, shall erect not less than ten double nozzle fire hydrants to the mile, the location of such hydrants to be made by the city engineer as directed by the city council.

SECTION 4. The said city of Hutchinson hereby agrees to rent, and does rent for fire protection, the one hundred and eighty-five (185) fire hydrants now located on the mains of the said water works from the Hutchinson Water, Light and Power Company, its successors or assigns, for the full term of this contract, and the said city of Hutchinson will pay for the use of said one hundred and eighty-five (185) hydrants an annual rent of $6,000, payable semi-annually on the first days of May and November of each year, less $1,000 per year rebate for two years from the passage of this ordinance, payments to be made as hereinafter specified. For all hydrants located on extensions hereafter ordered by the city council, as specified in section 3 of this ordinance the city of Hutchinson agrees to pay thirty-six dollars ($36.00) per annum for each hydrant so located, pay-

ments to be made as hereinafter specified. The said Hutchinson Water, Light and Power Company shall furnish water for sprinkling the streets of the city of Hutchinson at the rate of $12.50 per month for each wagon or sprinkler used in sprinkling said streets for one year from and after the date of the passage and approval of this ordinance, and for the next succeeding year, or second year after the passage and approval of this ordinance the said Hutchinson, Water, Light and Power Company shall furnish water for such street sprinkling purpose at the rate of $15.00 per month for each wagon or sprinkler used in sprinkling said streets.

All water used for flushing sewers shall be furnished at such rates as may be mutually agreed upon, not exceeding the meter rates specified in this ordinance, and after the expiration of two
26 years from the date of the passage and approval of this ordinance all water furnished by the said Hutchinson Water, Light and Power Company for the purpose of sprinkling streets shall be furnished at such rates as may be mutually agreed upon, not exceeding the meter rates specified in this ordinance. All water furnished for sprinkling streets shall be taken from tanks or through stand pipes erected by the city under such restrictions as may be imposed by the said Hutchinson Water, Light and Power Company as will prevent interference with the efficiency of the said water system and machinery for fire protection. The said city of Hutchinson shall have the right to pump and supply itself with water for sprinkling streets and flushing sewers at any and all times.

SECTION 5. In addition to furnishing water from the fire hydrants for the prevention and extinguishment of fires, as herein contemplated, the said Hutchinson Water, Light and Power Company its successors or assigns, shall furnish water to the said city and the inhabitants thereof living or doing business along the mains and pipes for all purposes, and in accordance with such rules and regulations as may be deemed necessary to the successful operation of said works, through any standard meters at not to exceed the following rates, the same to be paid either monthly, quarterly or yearly, in accordance with such rules and regulations as the managers of the water works may deem necessary for the successful operation of said works;

Provided, that the consumer shall have the right to purchase his meter of a kind acceptable to said Hutchinson Water, Light and Power Company from any person, and have the same properly set by any licensed plumber; and the said Hutchinson Water, Light and Power Company, its successors and assigns, shall receive a reasonable price for tapping its mains. No licensed plumber or any other person shall have the right to set any meter or any other plumbing fixtures in connection with any pipe supplying water from the water main of the system of said water works, nor make any extension of such pipes without obtaining a permit therefor
27 from the water works company.

Meter Rates.

5,000 or less gallons per month at 30 cents per 1,000 gallons.
5,000 to 10,000 gallons per month at 27½¢ per 1,000 gallons.
10,000 to 15,000 gallons per month at 25¢ per 1,000 gallons.
15,000 to 30,000 gallons per month at 20¢ per 1,000 gallons.
30,000 to 60,000 gallons per month at 18¢ per 1,000 gallons.
60,000 to 90,000 gallons per month at 16¢ per 1,000 gallons.
90,000 to 120,000 gallons per month at 14¢ per 1,000 gallons.
120,000 to 150,000 gallons per month at 12¢ per 1,000 gallons.
150,000 to 200,000 gallons per month at 10¢ per 1,000 gallons.
200,000 to 400,000 gallons per month at 9¢ per 1,000 gallons.
400,000 to 600,000 gallons per month at 8¢ per 1,000 gallons.
600,000 to 800,000 gallons per month at 7¢ per 1,000 gallons.
800,000 to 1,000,000 gallons per month at 6¢ per 1,000 gallons.
Over 1,000,000 gallons per month at 5¢ per 1,000 gallons.

Any consumer using water for sprinkling lawns and using 10,000 gallons or more per month shall have a rebate of 3 cents per 1,000 gallons from the foregoing meter rates. Minimum monthly bills on meters owned by consumers will be 25 cents. On meters owned by the company the minimum monthly bill will be on ⅝ inch, $1.00; ¾ inch, $2.00; 1 inch, $3.00; 1½ inch, $6.00; and 2 inches, $12.00.

The water company shall also have the right to supply water by special contract, when both parties to the contract can so agree, payment for same to be made in advance, either monthly or quarterly, and according to such rules as the water company may adopt.

SECTION 6. It is hereby agreed between the said Hutchinson Water, Light and Power Company, its successors and assigns, and the said City of Hutchinson, that all hydrant rental that becomes due and payable to the said Hutchinson Water, Light and Power Company, its successors or assigns, under the provisions of this contract, shall be paid in lawful money to the Fidelity Insurance, Trust and Safe Deposit Company of Philadelphia, Pa., or to such other
28 trustee of its bonds as the said Hutchinson Water, Light and Power Company, its successors or assigns, may direct, or to the order of the said Fidelity Insurance, Trust and Safe Deposit Company or other trustee of its bonds who may be named by said water company under this section, as the same may become due and payable; that is to say the city of Hutchinson shall pay to the order of said trust company, or other trustee of bonds who may be designated by the said water company under this section, all the hydrant rental, as the same shall become due and payable under the terms of this agreement, so long as this contract shall be in force, and until the works named in this contract shall become the property of the city of Hutchinson. In case of any change in trustee, the city shall be notified in writing.

SECTION 7. The machinery used in the water works constructed and contemplated under this contract shall have the capacity and be operated when required for the extinguishment of fires, so as to produce a pressure on the main at the works of 130 pounds. At such

times no hydrant other than those used for the extinguishment of fires shall be opened.

SECTION 8. The city of Hutchinson shall have the right to purchase the works, property and business created, acquired, constructed and contemplated under this contract at any time after the expiration of ten years from the adoption of this ordinance, upon giving one year's notice to the owners of said property and upon paying to said owners a fair value for the same as may be mutually agreed, or fixed by a court of competent jurisdiction. Said one year's notice may be given at any time after the expiration of nine years from the date of the passage and approval of this ordinance.

SECTION 9. The said Hutchinson Water, Light and Power Company, its successors or assigns, shall not at any time use the poles, wires and other appliances provided for in this ordinance in such a manner as to hinder or obstruct the commerce and trade of the city, nor obstruct the proper use of the streets, alleys, lanes, avenues, public grounds or other public places, excepting as may be necessary to make repairs, or extensions and improvements to its property and works.

SECTION 10. The said Hutchinson Water, Light and Power Company, its successors or assigns, shall at all times repair and make good any injuries which it may create in the erection, construction, maintenance or operation of the several works provided for in section one (1) of this ordinance, to any of the streets, alleys lanes, avenues, public grounds or other public places under control of the city, or any sidewalks, gutters, street railways and other improvements in the said streets, alleys, lanes avenues and public grounds under control of the city.

SECTION 11. Nothing in this ordinance shall be construed to prevent the city at any time from vacating any streets, alleys, avenues or lanes or changing or opening any new streets, lanes, avenues or public ground or any other public place in the city.

SECTION 12. The water supply, or place from which the water furnished by the Hutchinson Water, Light and Power Company is now, or may hereafter be taken, shall be guarded and protected by the said water company so far as may be reasonably possible, so as to supply clear potable water; and the city of Hutchinson agrees to exercise any or all of its rights and powers to prevent, stop and remove any and all contamination of such water supply and water. That is to say the city of Hutchinson shall exercise such rights and powers as it may legally have in the premises, when complaint is made, and the said water company cannot lawfully prevent, stop and remove such contamination. The said water company shall not be held responsible under this section for the failure of the city of Hutchinson to exercise its rights and powers as herein agreed. The city of Hutchinson shall have the right at all reasonable times to have pressure, specified in section 7 of this contract, tested. At all such tests, when made, not more than six fire streams shall be used at one time. These streams may be taken from any of the hydrants located by the city. The city of Hutchinson shall have the right to test the quality of the water at any time.

30 SECTION 13. The city of Hutchinson hereby agrees that it will pass all necessary ordinances for the protection of the property of the said water works, electric light works and gas works; to prevent the contamination of the water supply; to prevent the waste of water from the hydrants, mains, and pipes; to prevent all interference with its poles and wires, and that it will upon request of the said Hutchinson Water, Light and Power Company, its successors or assigns, proceed without delay to exercise its rights under the statutes of the state of Kansas, in the matter of the condemnation of any lot, parcel or piece of ground, or of water, or water privileges that may be necessary to the proper and convenient construction, maintenance and operation of the system of water, gas and electric light works contemplated in this ordinance.

Provided, That the said Hutchinson Water, Light and Power Company, its successors or assigns, pay all costs and expense incident thereto, including the cost of all property so condemned, and,

Provided, farther, That the right to free and exclusive control of all property so condemned shall rest and remain in the said Hutchinson Water, Light and Power Company, its successors or assigns.

SECTION 14. If the said Hutchinson Water, Light and Power Company, its successors or assigns, shall refuse to operate the water system contemplated in this ordinance at any time, that part of this franchise relating to the water system shall be forfeited, unless such failure to operate is unavoidable or due to accident.

SECTION 15. Nothing in this ordinance shall prevent any person or company from manufacturing gas, electricity or any other material for his or their own use for light or fuel, but in no case shall such persons supply others with gas or electric current for any purpose.

SECTION 16. All ordinances heretofore granted to the Hutchinson Water, Light and Power Company, or its predecessors, ex-
31 cepting ordinance No. 206, approved April 29, 1890, and that portion relating to telephones of ordinance No. 3, entitled "An ordinance to provide for the erection of poles, wires and other appliances in the streets, alleys and public grounds of the city of Hutchinson for the purpose of operating the electric lights and telephones," which was assigned to the Missouri & Kansas Telephone Company by the Hutchinson Water, Light and Power Company, August 27, A. D. 1889, are hereby repealed.

SECTION 17. This ordinance shall continue and be in force for the full term of twenty years after its publication once in the Hutchinson Daily News, and at the expiration of the said twenty years, unless the works and property thereto appertaining shall have become the property of the city of Hutchinson, it shall continue and be in force until such works and property thereto appertaining shall have become the property of the said city of Hutchinson.

SECTION 18. This ordinance and contract shall take effect and be in force from and after its publication in the Hutchinson Daily News and its acceptance in writing, filed with the city clerk by the Hutchinson Water, Light and Power Company, and the release of the city of Hutchinson from farther liability in the water contract

now existing with said Hutchinson Water, Light and Power Company.

Approved March 5, 1897.

Attest:

[SEAL.] FRANK VINCENT, *Mayor.*
W. R. UNDERWOOD,
City Clerk.

32 The foregoing ordinance was passed at a regular adjourned meeting of the Mayor and Councilmen of the City of Hutchinson, Reno County, Kansas, held at the Council Chamber of said City on Thursday, the 2nd day of March, 1897, and was published in the Hutchinson Daily News March 17, 1897.

Final Vote recorded on page 279, Journal No. 5.

W. R. UNDERWOOD,
City Clerk.

Minutes of the meeting of the board of directors of the Hutchinson Water, Light and Power Company on March 15, 1897, at the office of the company in Hutchinson.

All of the directors notified to be present and consented to this meeting.

Present, a quorum, consisting of H. Whiteside, J. E. Conklin, S. F. Hutton.

On motion the President and Secretary were authorized to accept the Franchise and Contract adopted by the City of Hutchinson, March 2, 1897, as a substitute for pre-existing contract and to give the City notice of such acceptance.

I, S. F. Hutton, Secretary of the Hutchinson, Water, Light and Power Company, certify that the within and foregoing is a copy of the minutes of the meeting of the Directors of the Hutchinson Water, Light and Power Company on March 15, 1897.

Witness my hand and seal this 15th day of March, 1897.

[SEAL.] S. F. HUTTON, *Secretary.*

To the City of Hutchinson, the Mayor and Council thereof:

The Hutchinson Water, Light and Power Company, of Hutchinson Kansas, hereby accepts the ordinance attached hereto, and adopted by the city of Hutchinson, on March 2, 1897, as a substitute for pre-existing contract for light, and notice is hereby given the City of Hutchinson of the acceptance, as required by section 18 of said ordinance No. 402.

THE HUTCHINSON WATER, LIGHT AND POWER CO.,
By H. WHITESIDE, *President.*

Attest:

[SEAL.] S. F. HUTTON, *Secretary.*

33 I, Wm. R. Underwood, Clerk of the city of Hutchinson, Reno county, Kansas, do hereby certify that the above are true copies of the acceptance of ordinance No. 402, and of the minutes filed in this office and attached to said ordinance No. 402.

[SEAL.] W. R. UNDERWOOD,
City Clerk.

I, George S. Bourne, clerk of the City of Hutchinson at this date, hereby certify the above and foregoing to be a correct copy of Ordinance No. 402, as found recorded in the Ordinance Book of the City of Hutchinson, Vol. 3, pages 301 to 307, and of the acceptance of the same, as recorded in same book, page 309. Witness my hand and the official seal of the city of Hutchinson, Reno county, Kansas, this 5th day of May, 1903.

[SEAL.] GEO. S. BOURNE,
City Clerk.

CHICAGO, *December* 1, 1902.

Messrs. Mason, Lewis & Company, Monadnock Block, City.

GENTLEMEN: I have examined the charter and records of the Water, Light and Gas Company, of New Jersey, the ordinance of the City of Hutchinson, Kansas, under which said company operates its electric light, water and gas plant in that city, its issue of bonds dated August 1, 1902, in the sum of $400,000 due August 1, 1932, with interest at five per cent. per annum, payable semi-annually, and the trust deed to the American Trust and Savings Bank, of Chicago, as Trustee, securing the same, together with the opinions and abstracts of title covering the premises in the city of Hutchinson, Kansas, comprising the Hutchinson plants of said Company conveyed in said trust deed, and from such examination I am of opinion that said Company has good title to said ordinance and premises, and that said bonds and trust deed are a valid and first lien on the franchises, rights of way and all other property of said Company now owned or hereafter to be acquired, together with the rents, issues and profits thereof, situate in the City of Hutchinson, Kansas, except that there is outstanding and unreleased a
34 prior trust deed from the Hutchinson Water, Light and Power Company to the fidelity Insurance Trust and Safe Deposit Company of Philadelphia, Trustee, due January 1, 1928, in the sum of $212,500 with interest at four per cent. per annum, payable semi-annually, for the payment of which provision is made in said trust deed of August 1, 1902, by the reserve of bonds.

Very truly yours,
(Signed) EUGENE E. PRUSSING.

Endorsed: No. 1101. Water, Light & Gas Company, *v.* J. P. Harsha *et al.* Bill for Injunction. Filed Dec. 21, 1905. Geo. F. Sharitt, Clerk, By J. F. Shearman, D. C.

35 In the Circuit Court of the United States for the District of Kansas, Second Division.

THE WATER, LIGHT & GAS COMPANY, a Corporation, Complainant,

vs.

J. P. HARSHA, Mayor; J. E. HOSTUTLER, L. A. BEEBE, M. I. HULTS, C. W. OSWALD, F. G. DELANO, JOHN BLAIR, W. E. LONG, W. S. THOMPSON, C. HOWARD, F. M. MCDERMED, C. O'NEAL, and C. I. PARKS, Councilmen, and S. F. JOHNSON, City Clerk, and EMERSON CAREY, K. E. SENTNEY, C. M. WILLIAMS, C. H. MCBURNEY, A. W. SMITH, and J. S. GEORGE, Defendants.

Præcipe.

To the clerk of the above named court:

Issue your subpœna in the above entitled cause as required by law, directed to the Marshal of the United States to be served on the above named defendants, and returned according to law.

Complainant will take judgment for injunction, costs and general relief.

H. WHITESIDE,
H. S. LEWIS,
FRANK DOSTER,
Attorneys for Complainant.

Endorsed: No. 1101. Præcipe for chan. spa. Filed Dec. 21, 1905. Geo. F. Sharitt, Clerk. By J. F. Shearman, D. C.

36 (Form No. 143.)

Chancery Subpœna.

UNITED STATES OF AMERICA,
District of Kansas, Second Division, ss:

The United States of America to J. P. Harsha, Mayor, J. E. Hostutler, L. A. Beebe, M. I. Hults, C. W. Oswald, F. G. Delano, John Blair, W. E. Long, W. S. Thompson, C. Howard, F. M. McDermed, C. O'Neal, and C. I. Parks, councilmen, and S. F. Johnson, city clerk, and Emerson Carey, K. E. Sentney, C. M. Williams, C. H. McBurney, A. W. Smith, and J. S. George, Greeting:

We command you and every one of you, that you appear before our Judge of our Circuit Court of the United States of America for the District of Kansas, Second Division, at the City of Wichita on the First Monday in the month of February next, to answer the bill of complaint of The Water, Light & Gas Company, a Corporation this day filed in the Clerk's Office of said Court, in said City of

Wichita then and there to receive and abide by such judgment and decree as shall then or thereafter be made, upon pain of judgment being pronounced against you by default.

To the marshal of the district of Kansas to execute.

Witness, The Hon. Melville W. Fuller, Chief Justice of the Supreme Court of the United States of America, at the City of Wichita in said District, this 21st day of December, in the year of our Lord one thousand nine hundred and five.

[SEAL.] GEO. F. SHARITT, *Clerk*,
By J. F. SHEARMAN, *Deputy*.

37 *Memorandum.*

The above-named defendants are notified that unless they enter their appearance in the Clerk's Office of said Court, at the City of Wichita aforesaid, on or before the day to which the above writ is returnable, the complaint will be taken against them as confessed, and a decree entered accordingly.

GEO F. SHARITT, *Clerk*,
By J. F. SHEARMAN, *Deputy*.

Marshal's Return.

Rec'd this writ at Wichita, Kansas, Dec. 24, 1905 and served the same at Hutchinson, Kansas, Dec. 27, 1905 upon the within named J. P. Harsha, Mayor, J. E. Hostutler, L. A. Beebe, M. I. Hults, C. W. Oswald, John Blair, W. E. Long, W. S. Thompson, C. Howard, F. M. McDermed, C. O'Neal and C. I. Parks, Councilman and S. F. Johnson, City Clerk and Emerson Carey, C. M. Williams, C. H. McBurney, A. W. Smith and J. S. George by delivering to each personally a true and certified copy of this writ, with all endorsements thereon.

The within named F. G. Delano, Councilman, and K. E. Sentney not served; not found in my district.

Fees $38.88.

WILLIAM H. MACKEY, JR.,
U. S. Marshal,
By C. F. BIDDLE, *Deputy*.

Endorsed: No. 1101. Circuit Court of the United States, District of Kansas, Second Division. The Water, Light & Gas Company a corporation *vs.* J. P. Harsha, Mayor, *et al.* Chancery Subpœna. Returnable to rule day First Monday in February, A. D. 1906. Geo. F. Sharitt, Clerk, By J. F. Shearman, Deputy. Filed Dec. 30th, A. D. 1905. Geo. F. Sharitt, Clerk. Frank Doster, H. Whiteside and Fairchild & Lewis, Complainant's Solicitor-.

38 In the District Court of the United States for the District of Kansas, Second Division.

THE WATER, LIGHT & GAS COMPANY, a Corporation, Complainant,
vs.
J. P. HARSHA, Mayor, ET AL., Defendants.

You are hereby notified that the Complainant in the above entitled action will, at the Baltimore Hotel, in Kansas City, Jackson County, Missouri, at eight o'clock P. M. on Friday, December 22, 1905, make application to the Hon. J. C. Pollock, Judge of the above named Court, for a restraining order in the above entitled cause, wherein you are the defendant.

The Complainant will present the petition with the affidavits of verity attached thereto.

You are further notified that if the said Judge aforesaid is not at Kansas City at said date, that the said application will be made in the Court room of the above named Court at the City of Topeka, Shawnee County, Kansas, at ten o'clock A. M., December 23, 1905.

H. WHITESIDE,
FRANK DOSTER, &
H. S. LEWIS,
Solicitors for Complainant.

39 Dec. 21, 1905, rec. this notice. Dec. 21, 1905, served the same by delivering a true copy to, C. M. Williams, Chas. Oswald, M. I. Hulce, L. A. Beeby, J. E. Hostutler, John Blair, W. E. Long, W. S. Thompson, C. Howard, Frank McDermed, C. Oneal, J. P. Harsha, K. E. Sentney, Emerson Carey, C. H. McBerney, A. W. Smith, J. S. George.

Dec. 21, 1905, served the same by leaving a true copy at the usual place of residence of the within name E. I. Parks.

C. H. SHIRK, *Constable.*

Constable fees, 1 person, 25¢.

Endorsed: #1101. The Water Light & Gas Co. *vs.* J. P. Harsha, Mayor. Notice and Proof of Service. Filed Dec. 26, 1905. Geo. F. Sharitt, Clerk, By J. F. Shearman, D. C.

40 In the Circuit Court of the United States for the District of Kansas, Second Division.

THE WATER, LIGHT & GAS CO., Complainant,
vs.
J. P. HARSHA, Mayor, ET AL., Defendants.

Agreement.

It is agreed between the plaintiff and all the defendants that no restraining order be applied for in this case, but in lieu thereof all

defendants agree with plaintiff that they will not commit any acts mentioned and sought to be restrained in the bill of complaint filed herein until plaintiff has the opportunity to present its application to Hon. J. C. Pollock for a temporary injunction, which said application is to be presented the 15th day of January, 1906, either at Topeka, Kansas, or at any place where the judge may be found.

Defendants hereby expressly reserve the right to plead to the jurisdiction and do not waive any rights of jurisdiction.

Dec. 22nd, 1905.

H. WHITESIDE &
H. S. LEWIS,
Att'ys for Plaintiff.
C. M. WILLIAM,
A. C. MALLOY,
Att'ys for Defendant.

Endorsed: 1101. Agreement. Filed Dec. 26, 1905. Geo. F. Sharitt, Clerk. By J. F. Shearman, D. C.

41 In the Circuit Court of the United States for the District of Kansas.

THE WATER, LIGHT & GAS CO., a Corporation, Complainant,
vs.
J. P. HARSHA, Mayor, & J. E. HOSTUTLER, L. A. BEEBE, M. I. HULTS, C. W. OSWALD, F. G. DELANO, JOHN BLAIR, W. E. LONG, W. S. THOMPSON, C. HOWARD, F. MCDERMED C. O'NEAL, & E. I. PARKS, Councilmen, & S. F. JOHNSON, City Clerk, *et al.*, Defendants.

Now comes the defendants above named by A. C. Malloy, solicitor and enter their appearance in the suit; and to the complainant's bill of complaint herein.

To the Clerk of said Court:

Enter the above in the Order Book in equity of said Court.

A. C. MALLOY,
Solicitor for Defendants Above Named.

Endorsed: No. 1101. The Water, Light & Gas Co. *vs.* J. P. Harsha Mayor, *et al.* Appearance of — See contents. Filed Jan'y 15, 1906. Geo. F. Sharitt, Clerk.

42 In the Circuit Court of the United States for the District of Kansas, Second Division.

THE WATER, LIGHT & GAS COMPANY, a Corporation, Complainant,

vs.

THE CITY OF HUTCHINSON, J. P. HARSHA, Mayor; J. E. HOSTUTLER, L. A. BEEBE, M. I. HULTS, G. W. OSWALD, F. G. DELANO, JOHN BLAIR, W. E. LONG, W. S. THOMPSON, C. HOWARD, F. M. MCDERMED, C. O'NEAL, and C. I. PARKS, Councilmen, and S. F. JOHNSON, City Clerk of said City, and EMERSON CAREY, K. E. SENTNEY, C. M. WILLIAMS, C. H. MCBURNEY, A. W. SMITH, and J. S. GEORGE, Defendants.

Amended Bill of Complaint.

To the Honorable the Judges of the Court aforesaid:

Your Orator, the Water, Light & Gas Company, files this, its amended bill of complaint against the above named defendants, and therein complains and alleges:—

First. That complainant is a corporation organized and existing under and by virtue of the laws of the State of New Jersey for the purpose of furnishing the public utilities and services of water, light, heat and power, and is a citizen of said State of New Jersey, and has been duly authorized by the State of Kansas, through the Charter Board of said State, to do business in said State of Kansas, and particularly in the city of Hutchinson in said State; that said city of Hutchinson is a municipal corporation, a city of the second class, organized and existing as such under the laws of the State of Kansas; that J. P. Harsha is Mayor, and J. E. Hostutler, L. A. Beebe, M. I. Hults, C. W. Oswald, F. G. Delano, John Blair, W. E. Long, W. S. Thompson, C. Howard, F. H. McDermed, C. O'Neal and C. I. Parks are Councilmen of said city; that S. F. John-

43 son is City Clerk of said city; that all of said officers of said city are citizens of the State of Kansas and residing in said city; that Emerson Carey, K. E. Sentney, C. M. Williams, C. H. McBurney, A. W. Smith and J. S. George are citizens of said State of Kansas and residing in said city.

Second. In the year 1885 the city of Hutchinson, by its duly enacted and published ordinance No. 199, granted to the Holly Manufacturing Company, a corporation organized and existing under the laws of the State of New York, its successors and assigns, a franchise and contract right to build and operate a waterworks in said city and extend pipes and mains through its streets, alleys and public places for the purpose of supplying the said city and the inhabitants thereof with water; that said grant contained in said ordinance gave to said Holly Manufacturing Company, its successors and assigns, the exclusive right for the term of twenty years from and after its taking effect, to maintain its said pipes and mains in the streets, alleys and public places of said city, and to supply said city and its

inhabitants with water. Said Holly Manufacturing Company, in and by its acceptance of the terms and provisions of said ordinance, contracted for itself, its successors and assigns, that it or they would rent to said city the use of certain of its hydrants or would furnish water to said city for the extinguishment of fires at the sum of $80.00 per hydrant per annum up to the number of seventy-five hydrants, and at the sum of $60.00 per hydrant per annum for all hydrants above said number of seventy-five, and said city contracted and agreed to pay said sums of money as and for said hydrant rental. Said Holly Manufacturing Company, and its successors and assigns hereafter named, in reliance on said ordinance and franchise and contract rights granted therein, erected waterworks in said city and placed therein valuable machinery for their operation and extended mains and pipes through the streets and public places of said city, put in hydrants as required, and in pursuance to its and their obligations furnished to the city and its inhabitants water at
44 the prices fixed in said ordinance, and made valuable and extensive betterments and improvements of the waterworks from time to time for the purpose of furnishing good water service to said city.

Third. In the year 1885 the said city of Hutchinson by ordinance No. 198 granted to the Inter-State Gas Company, a corporation organized under the laws of the State of Missouri but doing business and authorized to do business in the State of Kansas, its successors and assigns, a franchise and contract right to erect and maintain a plant for the manufacture and furnishing of gas and to extend and maintain gas-mains in connection therewith throughout said city and its streets and public places for the purpose of furnishing said city and the inhabitants thereof with gas, light, heat and power, which said franchise and contract was for the period of twenty-one years from the taking effect of said ordinance. In reliance on said franchise and contract said Inter-State Gas Company, and its successors and assigns hereafter named, erected a large and valuable gas plant in said city and extended its mains and pipes throughout the streets and other public places of said city and in pursuance to its and their obligations furnished said city and its inhabitants with gas for light and heat.

Fourth. In the year 1886 the said city of Hutchinson by ordinance No. 3 granted to one J. S. Drake and one C. M. Orton, citizens of the States of New York and Illinois, respectively, and partners under the firm name of Drake & Orton, their successors and assigns, a franchise to construct and operate an electric light plant in said city for the purpose of furnishing said city and the inhabitants thereof with electric light for lighting, heating and other purposes, with the right to erect poles, and extend wires and other appliances along, through and across the streets, alleys and other public places in said city. Said franchise and contract was for the period of twenty years from the taking effect of said ordinance. Said Drake & Orton, and their successors and assigns hereafter named, in reliance upon
45 said franchise and contract, erected an electric light plant in said city, placed therein valuable machinery for its opera-

tion, and erected poles, and extended wires thereon throughout the city, and in pursuance to their obligations, furnished electric light, heat and power to said city and its inhabitants.

Fifth. On the 7″ day of May, 1886, the aforenamed Holly Manufacturing Company, by and with the knowledge and consent of said city of Hutchinson, sold and assigned to the Hutchinson Water, Light & Telephone Company, a corporation organized under the laws of the State of Kansas, its successors and assigns, and the said Hutchinson Water, Light & Telephone Company purchased from said Holly Manufacturing Company, all the property, franchises and contracts belonging to said last named Company in said city of Hutchinson, and became the owner thereof and the successor and assignee of said Holly Manufacturing Company. And on the 1″ day of May, 1886, the aforenamed Drake & Orton, with the knowledge and consent of said city of Hutchinson, sold to said Hutchinson Water, Light & Telephone Company, its successors and assigns, and the said Hutchinson Water, Light & Telephone Company purchased from said Drake & Orton all the property, franchises and contracts belonging to said Drake & Orton in said city, and became the owner thereof and the successor and assignee of said Drake & Orton. And on the 20″ day of March, 1886, the aforenamed Inter-State Gas Company sold to the Hutchinson Gas, Light & Fuel Company, a corporation organized and existing under the laws of the State of Kansas, and its successors and assigns, and the said Hutchinson Gas, Light & Fuel Company purchased from said Inter-State Gas Company, all its property, franchises and contracts with said city, and became the owner thereof and the successor and assignee of said Inter-State Gas Company.

On the 20″ day of November, 1889, the corporate name of said Hutchinson Water, Light & Telephone Company was duly changed to that of the Hutchinson Water, Light & Power Company.

46 On the 20″ day of May, 1890, the aforenamed Hutchinson Gas, Light & Fuel Company, by and with the knowledge and consent of said city of Hutchinson, sold to the aforesaid Hutchinson Water, Light & Power Company, its successors and assigns, and the said Hutchinson Water, Light & Power Company purchased from said Hutchinson Gas, Light & Fuel Company, all the property, franchises and contracts belonging to said last named company in said city of Hutchinson, and became the owner thereof and the successor and assignee of said Hutchinson Gas, Light & Fuel Company, among which said franchises and contracts was one that had been secured to said Hutchinson Gas, Light & Fuel Company, its successors and assigns, by ordinance of said city No. 206, by the terms of which said ordinance said city agreed with said Hutchinson Gas, Light & Fuel Company, its successors and assigns, to take from it and use one hundred and twenty-five gas lights and to pay for the same at the rate of $25.00 per light per annum for the term of ten years commencing on the 1″ day of June, 1890.

Sixth. After the purchase by and assignment to the aforesaid Hutchinson Water, Light & Telephone Company of the aforesaid water, gas, light, heat and power franchises and contracts, it and the

aforesaid Hutchinson Water, Light & Power Company, to which its name had been changed, and the aforesaid Hutchinson Gas, Light & Fuel Company and its successor and assignee, from time to time, as the public requirements justified and as the mayor and councilmen of said city ordered and directed, made large investments and expenditures for the purpose of bettering and improving its plant and property, and for the extension of the service it had obligated itself to render said city and the inhabitants thereof, and in order to enable it to do so borrowed from time to time large sums of money until in or about the year 1890 the said sums so borrowed aggregated $400,000, which said money was expended by it for the purposes procured, to-wit, the betterment, improvement, enlargement and extension of the several water, light, gas, heat and power prop-
47 erties and services. To secure the said sum of $400,000, it, the said Water, Light & Power Company, executed a mortgage on all the aforesaid properties, including the aforesaid franchises and contract rights, and including the income from said city of Hutchinson which it was obligated to pay for the water, light and gas services so as aforesaid furnished to it.

Seventh. In the year 1897 the said city of Hutchinson became indebted to the said Hutchinson Water, Light & Power Company for hydrant rental in the sum of $12,800 in excess of its ability to pay, and then and there defaulted in the payment of said sum due to said Water, Light & Power Company. Before the year 1897 said city of Hutchinson had defaulted at various times in the payment of the sums due from it to said company for the several services furnished and performed for it by said company, so that the said company for several years preceding the year 1897 became, on account of said defaults, greatly embarrassed and hindered in the payment of interest due on its aforesaid mortgage indebtedness, and in the prosecution of its work of furnishing the services of water, light, heat and power to said city and its inhabitants, and in the year 1896, on account of the default of said city, and the hindrances and embarrassments caused to said company thereby, the holders of the aforesaid mortgage bonds of said company took possession of said various properties, franchises, contracts and public services and operated the same by and for themselves during said year 1896 and a portion of the year 1897 until the readjustment of the indebtedness due to said Water, Light & Power Company, and until the granting of the new franchise and contract next hereinafter mentioned were effected.

Eighth. Because of the embarrassed condition of said Water, Light & Power Company so as aforesaid caused by the delinquencies and defaults of said city of Hutchinson, it became expedient to reduce or scale down the bonded indebtedness of said company to its
48 aforesaid mortgage creditors, and to procure from said city of Hutchinson, for the benefit of said company and its mortgage creditors, a new franchise and contract for the furnishing of the aforenamed public services to said city and its inhabitants, and therefore it was agreed by said company and the holders of its said mortgage indebtedness that in the event of and in consideration of said

company securing a renewal and extension of its aforesaid franchises and contracts with said city and a readjustment of the contract obligations between said company and said city they, the said mortgage bondholders, would reduce or scale down their mortgage indebtedness from the aforesaid sum of $400,000 to the sum of $212,500.

On March 5", 1897, the said Water, Light & Power Company, at the special instance and request, and on the earnest and repeated solicitations of the said city of Hutchinson theretofore often made, and upon the representation of said city of its inability to pay all of the indebtedness then due from it to said company and to meet and discharge the current indebtedness thereafter to become due from it under the existing franchise and contract, agreed with said city to remit one-half of the indebtedness then due to it from said city and to consent to a reduction of the theretofore agreed prices for water and electric light to be thereafter furnished and to give to said city various other benefits and advantages presently hereafter to be named, including a surrender of all existing franchises and contracts, if the said city on its part would regrant and extend and renew the term of the aforesaid franchises and contracts and would make said franchises and contracts in respect of light, heat and power to be furnished said city and its inhabitants exclusive to said company for said term as the said water franchise and contract was already exclusive. Thereupon the said Water, Light & Power Company and the said city, in consideration of all the premises aforesaid, mutually made the concessions and readjustments now men-
49 tioned, to-wit, The said company on its part agreed to remit and did remit to said city the sum of $6,400 then due from said city, being one-half of the total sum then due and in default from said city, and agreed to reduce and did reduce the annual sum to be paid for hydrant rental from $12,800 to $6,000 for the remaining years covered by the franchise and contract held by said city, to-wit, for eight years and seven months, for the one hundred and eighty-five hydrants then located on the different mains in said city, and further agreed to reduce the rate of hydrant rental per annum from $60.00 to $36.00 per hydrant for all hydrants thereafter to be located on extension of water mains ordered and directed to be made by said city, and to reduce the number of hydrants on extensions of water mains thereafter ordered and directed to be made by said city from twelve per mile, as specified in the previous franchises and contracts, to ten per mile under the new franchise and contract to be made.

None of the aforementioned franchises and contracts made with said city provided for any right in said city to purchase or otherwise acquire said properties or to terminate the aforesaid franchises and contracts at earlier dates than the dates in said ordinance grants specified. Wherefore the said company on its part, in consideration of the premises aforesaid, agreed to and with said city that at the end of ten years thereafter, or at any time after the expiration of ten years, said city should have the right and privilege of acquiring the ownership and possession of all of said property, and the termination

of all of said franchises and contracts on the payment of compensation therefor to be mutually agreed on or to be fixed by a court of competent jurisdiction. Thereupon said city, having solicited said Water, Light & Power Company to make the aforesaid concessions, and having procured the same to be made in consideration thereof, on its part consented to a regrant or renewal and extension
50 of the aforesaid franchises and contracts, embodying all and singular the aforesaid concessions and considerations, and to evidence and secure the same it, the said city, by a certain ordinance No. 402, approved March 5", 1897, and published in a newspaper and taking effect March 17", 1897, granted to said company, its successors and assigns, for the period of twenty years from said date the exclusive right and privilege of supplying said city and its inhabitants with the public utilities of water, and of light, heat and power by means of electric current and gas, a copy of which said ordinance is hereto attached and made a part of this bill.

In and by the terms and conditions of said ordinance, and as one of the concessions made by said Water, Light & Power Company for itself, its successors and assigns, it was agreed that said franchise for furnishing electric current or power should not be exclusive as to or for the operation of street railways in said city, nor should it be exclusive as to any person residing in said city nor any company doing business therein as to prevent said persons or companies from manufacturing gas, electricity or other material for his or their own use for light or fuel, but as to all other persons and companies, and as to all other purposes the said franchise, contracts and grant contained in said ordinance gave to said company, its successors and assigns, for the period named, exclusive rights and privileges.

Said concessions by said company and said abatements of indebtedness by it would not have been made by it save and except in return and for the consideration of the aforesaid exclusive rights and privileges so as aforesaid granted and conferred.

The total abatements and reductions of monetary demands made by said company for the considerations aforementioned were the sum of $6,400 of past due indebtedness, and the sum of $6,800 per annum of indebtedness secured by contract for future water
51 services, to-wit, for the period of eight years and seven months which said water franchise had yet to run, in all the sum of $58,840 for said future services, being a total of $65,240 which said company remitted from its contract rights and demands against said city.

Thereafter in the year 1898 the mortgage bondholders of said Water, Light & Power Company who had become at great expense to themselves also the capital stock of said company in consideration of their promise and agreement so as aforesaid made with said company and for the purpose of effectuating the promises and agreements between said company and said city contained in said ordinance No. 402, scaled down and reduced their said indebtedness from the sum of $400,000 to $212,500 and canceled and released their said mortgage of $400,000, and in lieu thereof agreed

to substitute and did substitute a mortgage on the property, franchises and contracts of said company and on the income from its performance of the aforesaid public services in the sum of only $212,500. Said mortgage in said sum still subsists on said property, franchises contracts and income and remains due and unpaid and has yet remaining more than twenty years to run.

Ninth. The said Hutchinson Water, Light & Power Company remained in the possession of the aforesaid franchise and contract rights from the 5″ day of March, 1897, until the 4″ day of October, 1902, when it sold and transferred to your orator all of its property, contracts and franchises and by deed of said date conveyed the same to your orator, and your orator since said date has been in the possession and enjoyment of the same and in the fulfillment of all the duties and obligations imposed on it by virtue of its said purchase and said ordinance liabilities. Said sale and conveyance to your orator, and said assumption and discharge of said ordinance obligations were all made with the knowledge and consent of said city of Hutchinson and the said city has ratified
52 and approved the same and contracted and dealt with your Orator as the rightful successor and grantee of said Hutchinson Water, Light & Power Company.

Tenth. Since the purchase of said water, light and power property, and in the discharge of the obligations resting upon it your Orator, as the successor of said Hutchinson Water, Light & Power Company, has expended large sums of money in the betterment, improvement and extension of its several public services and in particular has at divers times, under the order and direction of said city, placed a large number of hydrants on extensions of water mains over and in addition to the original number of one hundred and eighty-five hydrants in said city at the time of the passage of said ordinance No. 402, March 5″, 1897, which said additional hydrants, as agreed upon as aforesaid, were in the number of ten per mile instead of twelve per mile as agreed upon between said city and said Water, Light & Power Company prior to the passage of said ordinance No. 402. And your orator since its acquisition of said property, franchises and contracts, and in obedience to the order and direction of said city, and at large expense to itself, but without any obligation to do so, has taken up about two miles of water main which had been theretofore by order of said city located at disadvantageous and unnecessary places where they were useless for the purpose of said city and its inhabitants, and has removed and relocated the same at large expense to itself to places of utility and advantage to said city and its inhabitants whereby said city was saved large sums of hydrant rentals for said hydrants at said disadvantageous and useless locations.

And your Orator further says that among other things, in obedience to the request of said city, but without any obligation so to do, it changed a large number of its all-night lamps to half night-lamps, whereby it surrendered to said city its claim and demand
53 for the cost of all-night service to the lower cost of half-night service. Your Orator says that all of the aforementioned

betterments and improvements and expenditures of money and concessions to said city were made by it in reliance on the obligation of said city and its good faith in carrying out all the terms and conditions and provisions of said ordinance contract No. 402, and would not have been made or done except for its reliance on said obligation and good faith of said city; nor would it have made its purchase of said property, franchise and contracts as hereinbefore stated except for its reliance on the obligation and good faith of said city in carrying out the terms and provisions of said ordinance contract.

Eleventh. Your Orator says that from and since its aforesaid purchase of said property, franchises and contracts it has fully and in good faith observed all the terms and conditions of said ordinance contract No. 402, and all the terms and conditions of all dependent contracts made and executed between it and said city in regard to the furnishing of all the aforesaid public services; that it has furnished an adequate supply of good, wholesome water to said city and to the inhabitants thereof, and an adequate and efficient electric light and electric power service fully up to the required standard to said city and its inhabitants, and has furnished to the inhabitants of said city a good quality of manufactured gas, and in all respects has rendered efficient and adequate services to said city at the rates prescribed by said ordinance contract No. 402, and in many particulars and instances at rates far below those which by said ordinance it was permitted to charge, and wherein said ordinance did not prescribe rates for services furnished it has furnished said services at fair and reasonable rates, and since its acquisition of said property has largely reduced the rates for said services below the rates charged by its predecessor, the aforesaid Hutchinson
54 Water, Light & Power Company.

Twelfth. Your Orator further avers that notwithstanding the premises aforesaid, and in particular regardless of the aforesaid ordinance contract by which the exclusive right to furnish the aforesaid public services to said city and its inhabitants was secured to the aforesaid Water, Light & Power Company and your Orator as its successor and grantee, the said city, by and through its mayor and councilmen heretofore named, and on or about the 19" day of December, 1905, enacted and published an ordinance No. 651 by and in accordance with the terms of which, and in particular by the terms of sections twenty-one and twenty-three thereof, it assumed to grant to the aforenamed Emerson Carey, K. E. Sentney, C. M. Williams, C. H. McBurney, A. W. Smith and J. S. George, the right and privilege for the term of twenty years thereafter of establishing and operating in said city a plant and appliances for the manufacture and sale to said city and its inhabitants of electric light and power and manufactured and natural gas, with the right and privilege to lay and construct gas mains and pipes and erect poles and wires and all other things necessary to the maintenance of said public services in the streets, alleys and public places of said city and in opposition to the like business of your Orator in said city, a copy of which said ordinance No. 651 is hereto attached and made a part of this bill of

complaint, and they, the said grantees of said assumed and pretended ordinance franchise right, threaten and give out that they will immediately proceed to the erection of their said public service plants and properties and the utilization of said pretended franchise and contract rights so assumed to have been granted to them.

Thirteenth. Your Orator says that the aforementioned ordinance No. 402 was enacted by the councilmen of said city and approved by the mayor of said city in pursuance of authority to enact the same duly conferred on said mayor and council by the public
55 statutes of the State of Kansas and was accepted by said company and by your Orator as its successor and grantee, and the same constitutes in respect of all the rights secured to your Orator, and in particular in respect of the exclusive rights and privileges thereby conferred a contract between said city and your Orator which the action of said mayor and council of said city by and through said ordinance No. 651 illegally and inequitably impairs, wherefore your orator says that said action of said mayor and council is in violation of that provision of the Constitution of the United States which forbids the impairment of the obligation of contracts by the several States of the Union.

Fourteenth. Your Orator further says that notwithstanding the making, as aforesaid alleged, of all the large monetary abatements of past due indebtedness and concessions and reductions of contract price, and the other large and valuable considerations paid or secured to said city in consideration of its enactment of said ordinance No. 402, neither it, the said city, nor any of the grantees or beneficiaries named in said ordinance No. 651 have paid or tendered to your Orator a return of any of said sums of money or have in anywise offered to make your Orator whole in respect thereto or to secure your Orator against loss from the competition of said proposed rival public service association or company.

Fifteenth. Your orator says that the time said public service enterprises were undertaken by the several aforenamed companies and down to and including the acquisition of said public service franchises and properties and contracts of your orator the city of Hutchinson was small in population, at the first of said time not more than five thousand and at the last of said time not more than ten thousand in number; that it would have been impossible at either of said times, through lack of sufficient patronage, to have maintained rival or competing public service companies in said city, and it is impossible now, through lack of sufficient patronage, to maintain two said companies in said city in competition with each
56 other and enable either of them to earn a fair and reasonable income on the cost of their respective properties, and at the times aforesaid mentioned no association or individual would have undertaken the establishment and maintenance in said city of said public services without being secured in the enjoyment thereof for a reasonable time as against the competition of rival companies by exclusive grants or privileges for a time sufficient to enable them to have secured a return of the capital invested with reasonable interest

or income thereon for the time being, nor could the large sums of money necessary to enable the establishment and building and maintenance of said public services have been secured save, and except under and in pursuance to ordinance contracts conferring such exclusive rights as would enable the borrowing of said money and to make assured repayment of the same with reasonable interest thereon: And your Orator says that it has not up to this time and will not for many years yet to come have secured the repayment of the purchase price of said public services and the cost of the various betterments, improvements and extensions of the same which have been made.

Sixteenth. Your orator avers that it does not seek to prevent the granting of the franchise contained in said ordinance No. 651 for the erection and maintenance of an electric light or power plant for the operation of a street railway in said city of elsewhere, but your Orator says that the establishment and maintenance of said public service so assumed to be authorized by said ordinance No. 651 for any other purpose than the operation of an electric railway would be a violation of your Orator's rights and would cause your Orator great and irreparable damage; And your Orator says that the amount of said damage and the value or amount of the matter in dispute in this action exclusive of costs of said action are far in excess of the sum of $2,000.

57 Wherefore, your Orator prays, as in its original bill, that a subpœna do issue and be served upon all defendants not yet served therewith, commanding them to make answer hereto, that a writ of injunction be issued commanding the defendants and all persons claiming to act under their authority and direction to refrain and desist from doing any acts or exercising any pretenses of right to act under the aforesaid ordinance No. 651 granted to defendants as aforesaid which will in anywise affect the exclusive rights of your Orator to furnish the said city and its inhabitants with electric or gas light for lighting and heating purposes or power except for street cars and electric railways, and also from making or proceeding to make any contract for furnishing light or gas to said city and its inhabitants until the expiration of the aforesaid franchises and contracts of your orator with said city.

And your Orator also prays for such other and further relief as may be equitable and just, and particularly that a temporary order of restraint or injunction issue against said defendants until the final determination of this suit, and that thereupon the said temporary injunction be made perpetual.

H. WHITESIDE,
FAIRCHILD & LEWIS,
FRANK DOSTER,
Solicitors for Complainant.

UNITED STATES OF AMERICA, *District of Kansas, ss:*

W. E. Hutchinson being duly sworn on oath says, that he is the President and General Manager of the Water, Light & Gas Company,

the complainant in the foregoing amended bill of complaint, and that he is duly authorized to verify the allegations of the foregoing amended bill of complaint; that said complainant is a cor-
58 poration and a nonresident of the State of Kansas; that affiant is familiar with all the facts stated in the said foregoing amended bill of complaint, and that all the matters and things therein stated are true in substance and in fact.

W. E. HUTCHINSON.

Subscribed and sworn to before me this 15" day of January, 1906.
[SEAL.] GEO. F. SHARITT, *Clerk.*

59 *Ordinance No.* 402.

An ordinance to provide for a system of water works, electric light works and gas works, and supply of water, electric current and gas to the city of Hutchinson, and the inhabitants thereof.

Whereas, The Hutchinson Water, Light and Power Company is the owner of certain exclusive franchises and contracts with the city of Hutchinson, under which and in accordance with which the said company has expended large sums of money in constructing and building water works, electric light works and gas works, and in building up the business of said works, which are now in successful operation in supplying the city of Hutchison and the inhabitants thereof with water, electric current and gas for all purposes for which water, electric current and gas is used; and

Whereas, The city of Hutchinson is desirous of modifying and changing said franchise and contracts to the advantage of said city of Hutchinson without cancelling or abridging any of the rights or privileges vested in said company by reason of its labor and investments under said franchises and contracts other than the modifications hereinafter specified.

Therefore, In consideration of the surrender of all the existing contracts and franchises of said company with the city of Hutchinson, excepting as hereinafter specified,

Be it ordained by the Mayor and Council of the city of Hutchinson, Kansas:

SECTION 1. That there is hereby given and granted to the Hutchinson Water, Light and Power Company, of Hutchinson, Kansas, its successors or assigns, the exclusive right and privileges for the term of twenty years from the date of the passage and approval of this ordinance of supplying the city of Hutchinson, Reno county, Kansas, and the inhabitants thereof, by a system of works with water for the prevention and extinguishment of fires and for all other purposes for which water may be used, (said water works to be the Holly system); with electric current for electric light and
60 power, and for all other purposes for which electric current may be used, except power for the operation of street railways, which exception shall not prevent said Water, Light and Power Company from furnishing electric currents to street railways for

any and all purposes; and with gas for lighting, heating and for fuel, and for all other purposes for which gas may be used, in accordance with the terms and conditions set forth in this ordinance.

SECTION 2. That said Hutchinson Water, Light and Power Co., its successors or assigns, is hereby authorized to maintain, extend and operate said works in or adjacent to the city of Hutchinson, to receive, take, store, purify, conduct and distribute said water, electric current and gas through said city, to construct and extend aqueducts, mains, pipes and erect poles and wires through all the streets, alleys lanes and public grounds and to cross any stream or bridge in said city, to erect and maintain all engines, machinery and other appliances necessary for conducting any of said works, and for supplying said city and the inhabitants thereof with water, electric current and gas for the purposes herein mentioned, and for such purposes the said Hutchinson Water, Light and Power Company, its successors or assigns, shall have the right, and is hereby authorized to use the streets, alleys, avenues, lanes and public grounds in or adjacent to said city, and shall have the right to take up any pavements or sidewalks, and made such excavations therein as may be necessary to lay, repair and maintain aqueducts, mains and pipes below the surface of the ground for conveying and distributing the water and gas, and for erecting poles for electric wires as aforesaid;

Provided, that the said Hutchinson Water, Light and Power Company, its successors or assigns, shall suitably guard and protect such excavations so as to prevent injury to persons and property by reason thereof, and

Provided further, that such excavations shall be filled and such pavements and sidewalks replaced in as good condition as before, and as soon as possible thereafter as the circumstances will permit.

SEC. 3. All water mains hereinafter ordained to be laid by
61 the city shall be so located as to comply with the general plan of water distribution of the system so as to avoid dead ends as far as practicable, and on all such extensions of water mains ordered by the city council, the said Hutchinson Water, Light and Power Company, its successors or assigns, shall erect not less than ten double nozzle fire hydrants to the mile, the location of such hydrants to be made by the city engineer as directed by the city council.

SECTION 4. The said city of Hutchinson hereby agrees to rent, and does rent for fire protection, the one hundred and eighty-five (185) fire hydrants now located on the mains of the said water works from the Hutchinson Water, Light and Power Company, its successors or assigns, for the full term of this contract, and the said city of Hutchinson will pay for the use of said one hundred and eighty-five (185) hydrants an annual rent of $6,000, payable semi-annually on the first days of May and November of each year, less $1,000 per year rebate for two years from the passage of this ordinance, payments to be made as hereinafter specified. For all hydrants located on extensions hereafter ordered by the city council, as specified in section 3 of this ordinance the city of Hutchinson agrees to pay thirty-six dollars ($36.00) per annum for each hydrant so located, pay-

ments to be made as hereinafter specified. The said Hutchinson Water, Light and Power Company shall furnish water for sprinkling the streets of the city of Hutchinson at the rate of $12.50 per month for each wagon or sprinkler used in sprinkling said streets for one year from and after the date of the passage and approval of this ordinance, and for the next succeeding year, or second year after the passage and approval of this ordinance the said Hutchinson, Water, Light and Power Company shall furnish water for such street sprinkling purpose at the rate of $15.00 per month for each wagon or sprinkler used in sprinkling said streets.

All water used for flushing sewers shall be furnished at such rates as may be mutually agreed upon, not exceeding the meter rates specified in this ordinance, and after the expiration of two
62 years from the date of the passage and approval of this ordinance all water furnished by the said Hutchinson Water, Light and Power Company for the purpose of sprinkling streets shall be furnished at such rates as may be mutually agreed upon, not exceeding the meter rates specified in this ordinance. All water furnished for sprinkling streets shall be taken from tanks or through stand pipes erected by the city under such restrictions as may be imposed by the said Hutchinson Water, Light and Power Company as will prevent interference with the efficiency of the said water system and machinery for fire protection. The said city of Hutchinson shall have the right to pump and supply itself with water for sprinkling streets and flushing sewers at any and all times.

SECTION 5. In addition to furnishing water from the fire hydrants for the prevention and extinguishment of fires, as herein contemplated, the said Hutchinson Water, Light and Power Company its successors or assigns, shall furnish water to the said city and the inhabitants thereof living or doing business along the mains and pipes for all purposes, and in accordance with such rules and regulations as may be deemed necessary to the successful operation of said works, through any standard meters at not to exceed the following rates, the same to be paid either monthly, quarterly or yearly, in accordance with such rules and regulations as the managers of the water works may deem necessary for the successful operation of said works;

Provided, that the consumer shall have the right to purchase his meter of a kind acceptable to said Hutchinson Water, Light and Power Company from any person, and have the same properly set by any licensed plumber; and the said Hutchinson Water, Light and Power Company, its successors and assigns, shall receive a reasonable price for tapping its mains. No licensed plumber or any other person shall have the right to set any meter or any other plumbing fixtures in connection with any pipe supplying water from the water main of the system of said water works, nor make any extension of such pipes without obtaining a permit therefor
63 from the water works company.

Meter Rates.

5,000 or less gallons per month at 30 cents per 1,000 gallons.
5,000 to 10,000 gallons per month at 27½¢ per 1,000 gallons.
10,000 to 15,000 gallons per month at 25¢ per 1,000 gallons.
15,000 to 30,000 gallons per month at 20¢ per 1,000 gallons.
30,000 to 60,000 gallons per month at 18¢ per 1,000 gallons.
60,000 to 90,000 gallons per month at 16¢ per 1,000 gallons.
90,000 to 120,000 gallons per month at 14¢ per 1,000 gallons.
120,000 to 150,000 gallons per month at 12¢ per 1,000 gallons.
150,000 to 200,000 gallons per month at 10¢ per 1,000 gallons.
200,000 to 400,000 gallons per month at 9¢ per 1,000 gallons.
400,000 to 600,000 gallons per month at 8¢ per 1,000 gallons.
600,000 to 800,000 gallons per month at 7¢ per 1,000 gallons.
800,000 to 1,000,000 gallons per month at 6¢ per 1,000 gallons.
Over 1,000,000 gallons per month at 5¢ per 1,000 gallons.

Any consumer using water for sprinkling lawns and using 10,000 gallons or more per month shall have a rebate of 3 cents per 1,000 gallons from the foregoing meter rates. Minimum monthly bills on meters owned by consumers will be 25 cents. On meters owned by the company the minimum monthly bill will be on ⅝ inch, $1.00; ¾ inch, $2.00; 1 inch, $3.00; 1½ inch, $6.00; and 2 inches, $12.00.

The water company shall also have the right to supply water by special contract, when both parties to the contract can so agree, payment for same to be made in advance, either monthly or quarterly, and according to such rules as the water company may adopt.

SECTION 6. It is hereby agreed between the said Hutchinson Water, Light and Power Company, its successors and assigns, and the said City of Hutchinson, that all hydrant rental that becomes due and payable to the said Hutchinson Water, Light and Power Company, its successors or assigns, under the provisions of this contract, shall be paid in lawful money to the Fidelity Insurance, Trust and Safe Deposit Company of Philadelphia, Pa., or to such other
64 trustee of its bonds as the said Hutchinson Water, Light and Power Company, its successors or assigns, may direct, or to the order of the said Fidelity Insurance, Trust and Safe Deposit Company or other trustee of its bonds who may be named by said water company under this section, as the same may become due and payable; that is to say the city of Hutchinson shall pay to the order of said trust company, or other trustee of bonds who may be designated by the said water company under this section, all the hydrant rental, as the same shall become due and payable under the terms of this agreement, so long as this contract shall be in force, and until the works named in this contract shall become the property of the city of Hutchinson. In case of any change in trustee, the city shall be notified in writing.

SECTION 7. The machinery used in the water works constructed and contemplated under this contract shall have the capacity and be operated when required for the extinguishment of fires, so as to produce a pressure on the main at the works of 130 pounds. At such

times no hydrant other than those used for the extinguishment of fires shall be opened.

SECTION 8. The city of Hutchinson shall have the right to purchase the works, property and business created, acquired, constructed and contemplated under this contract at any time after the expiration of ten years from the adoption of this ordinance, upon giving one year's notice to the owners of said property and upon paying to said owners a fair value for the same as may be mutually agreed, or fixed by a court of competent jurisdiction. Said one year's notice may be given at any time after the expiration of nine years from the date of the passage and approval of this ordinance.

SECTION 9. The said Hutchinson Water, Light and Power Company, its successors or assigns, shall not at any time use the poles, wires and other appliances provided for in this ordinance in such a manner as to hinder or obstruct the commerce and trade of the city, nor obstruct the proper use of the streets, alleys, lanes, avenues, public grounds or other public places, excepting as may be necessary to make repairs, or extensions and improvements to its property and works.

SECTION 10. The said Hutchinson Water, Light and Power Company, its successors or assigns, shall at all times repair and make good any injuries which it may create in the erection, construction, maintenance or operation of the several works provided for in section one (1) of this ordinance, to any of the streets, alleys lanes, avenues, public grounds or other public places under control of the city, or any sidewalks, gutters, street railways and other improvements in the said streets, alleys, lanes avenues and public grounds under control of the city.

SECTION 11. Nothing in this ordinance shall be construed to prevent the city at any time from vacating any streets, alleys, avenues or lanes or changing or opening any new streets, lanes, avenues or public ground or any other public place in the city.

SECTION 12. The water supply, or place from which the water furnished by the Hutchinson Water, Light and Power Company is now, or may hereafter be taken, shall be guarded and protected by the said water company so far as may be reasonably possible, so as to supply clear potable water; and the city of Hutchinson agrees to exercise any or all of its rights and powers to prevent, stop and remove any and all contamination of such water supply and water. That is to say the city of Hutchinson shall exercise such rights and powers as it may legally have in the premises, when complaint is made, and the said water company cannot lawfully prevent, stop and remove such contamination. The said water company shall not be held responsible under this section for the failure of the city of Hutchinson to exercise its rights and powers as herein agreed. The city of Hutchinson shall have the right at all reasonable times to have pressure, specified in section 7 of this contract, tested. At all such tests, when made, not more than six fire streams shall be used at one time. These streams may be taken from any of the hydrants located by the city. The city of Hutchinson shall have the right to test the quality of the water at any time.

66 SECTION 13. The city of Hutchinson hereby agrees that it will pass all necessary ordinances for the protection of the property of the said water works, electric light works and gas works; to prevent the contamination of the water supply; to prevent the waste of water from the hydrants, mains, and pipes; to prevent all interference with its poles and wires, and that it will upon request of the said Hutchinson Water, Light and Power Company, its successors or assigns, proceed without delay to exercise its rights under the statutes of the state of Kansas, in the matter of the condemnation of any lot, parcel or piece of ground, or of water, or water privileges that may be necessary to the proper and convenient construction, maintenance and operation of the system of water, gas and electric light works contemplated in this ordinance.

Provided, That the said Hutchinson Water, Light and Power Company, its successors or assigns, pay all costs and expense incident thereto, including the cost of all property so condemned, and,

Provided, farther, That the right to free and exclusive control of all property so condemned shall rest and remain in the said Hutchinson Water, Light and Power Company, its successors or assigns.

SECTION 14. If the said Hutchinson Water, Light and Power Company, its successors or assigns, shall refuse to operate the water system contemplated in this ordinance at any time, that part of this franchise relating to the water system shall be forfeited, unless such failure to operate is unavoidable or due to accident.

SECTION 15. Nothing in this ordinance shall prevent any person or company from manufacturing gas, electricity or any other material for his or their own use for light or fuel, but in no case shall such persons supply others with gas or electric current for any purpose.

SECTION 16. All ordinances heretofore granted to the Hutchinson Water, Light and Power Company, or its predecessors, ex-
67 cepting ordinance No. 206, approved April 29, 1890, and that portion relating to telephones of ordinance No. 3, entitled "An ordinance to provide for the erection of poles, wires and other appliances in the streets, alleys and public grounds of the city of Hutchinson for the purpose of operating the electric lights and telephones," which was assigned to the Missouri & Kansas Telephone Company by the Hutchinson Water, Light and Power Company, August 27, A. D. 1889, are hereby repealed.

SECTION 17. This ordinance shall continue and be in force for the full term of twenty years after its publication once in the Hutchinson Daily News, and at the expiration of the said twenty years, unless the works and property thereto appertaining shall have become the property of the city of Hutchinson, it shall continue and be in force until such works and property thereto appertaining shall have become the property of the said city of Hutchinson.

SECTION 18. This ordinance and contract shall take effect and be in force from and after its publication in the Hutchinson Daily News and its acceptance in writing, filed with the city clerk by the Hutchinson Water, Light and Power Company, and the release of the city of Hutchinson from farther liability in the water contract

now existing with said Hutchinson Water, Light and Power Company.

Approved March 5, 1897.

Attest:

[SEAL.] FRANK VINCENT, *Mayor.*
W. R. UNDERWOOD,
City Clerk.

68 The foregoing ordinance was passed at a regular adjourned meeting of the Mayor and Councilmen of the City of Hutchinson, Reno County, Kansas, held at the Council Chamber of said City on Thursday, the 2nd day of March, 1897, and was published in the Hutchinson Daily News March 17, 1897.

Final Vote recorded on page 279, Journal No. 5.

W. R. UNDERWOOD,
City Clerk.

Minutes of the meeting of the board of directors of the Hutchinson Water, Light and Power Company on March 15, 1897, at the office of the company in Hutchinson.

All of the directors notified to be present and consented to this meeting.

Present, a quorum, consisting of H. Whiteside, J. E. Conklin, S. F. Hutton.

On motion the President and Secretary were authorized to accept the Franchise and Contract adopted by the City of Hutchinson, March 2, 1897, as a substitute for pre-existing contract and to give the City notice of such acceptance.

I, S. F. Hutton, Secretary of the Hutchinson, Water, Light and Power Company, certify that the within and foregoing is a copy of the minutes of the meeting of the Directors of the Hutchinson Water, Light and Power Company on March 15, 1897.

Witness my hand and seal this 15th day of March, 1897.

[SEAL.] S. F. HUTTON, *Secretary.*

To the City of Hutchinson, the Mayor and Council thereof:

The Hutchinson Water, Light and Power Company, of Hutchinson Kansas, hereby accepts the ordinance attached hereto, and adopted by the city of Hutchinson, on March 2, 1897, as a substitute for pre-existing contract for light, and notice is hereby given the City of Hutchinson of the acceptance, as required by section 18 of said ordinance No. 402.

THE HUTCHINSON WATER, LIGHT
AND POWER CO.,
By H. WHITESIDE, *President.*

Attest:

[SEAL.] S. F. HUTTON, *Secretary.*

69 I, Wm. R. Underwood, Clerk of the city of Hutchinson, Reno county, Kansas, do hereby certify that the above are true copies of the acceptance of ordinance No. 402, and of the minutes filed in this office and attached to said ordinance No. 402.

[SEAL.] W. R. UNDERWOOD,
City Clerk.

I, George S. Bourne, clerk of the City of Hutchinson at this date, hereby certify the above and foregoing to be a correct copy of Ordinance No. 402, as found recorded in the Ordinance Book of the City of Hutchinson, Vol. 3, pages 301 to 307, and of the acceptance of the same, as recorded in same book, page 309. Witness my hand and the official seal of the city of Hutchinson, Reno county, Kansas, this 5th day of May, 1903.

[SEAL.] GEO. S. BOURNE,
City Clerk.

CHICAGO, *December* 1, 1902.

Messrs. Mason, Lewis & Company, Monadnock Block, City.

GENTLEMEN: I have examined the charter and records of the Water, Light and Gas Company, of New Jersey, the ordinance of the City of Hutchinson, Kansas, under which said company operates its electric light, water and gas plant in that city, its issue of bonds dated August 1, 1902, in the sum of $400,000 due August 1, 1932, with interest at five per cent. per annum, payable semi-annually, and the trust deed to the American Trust and Savings Bank, of Chicago, as Trustee, securing the same, together with the opinions and abstracts of title covering the premises in the city of Hutchinson, Kansas, comprising the Hutchinson plants of said Company conveyed in said trust deed, and from such examination I am of opinion that said Company has good title to said ordinance and premises, and that said bonds and trust deed are a valid and first lien on the franchises, rights of way and all other property of said Company now owned or hereafter to be acquired, together with the rents, issues and profits thereof, situate in the City of Hutchinson,

Kansas, except that there is outstanding and unreleased a
70 prior trust deed from the Hutchinson Water Light and Power Company to the fidelity Insurance Trust and Safe Deposit Company of Philadelphia, Trustee, due January 1, 1928, in the sum of $212,500 with interest at four per cent. per annum, payable semi-annually, for the payment of which provision is made in said trust deed of August 1, 1902, by the reserve of bonds.

Very truly yours,
(Signed) EUGENE E. PRUSSING.

71 *Ordinance No.* 651.

An ordinance granting permission and authority to Emerson Carey, K. E. Sentney, C. M. Williams, C. H. McBurney, A. W. Smith and J. S. George, their successors or assigns to construct and operate a Street Railway in and along the streets and avenues of the City of Hutchinson, Reno County, Kansas, and to construct, operate and maintain an electric plant for the purpose of furnishing electric current for electric lights and power and for all other purposes for which electric current may be used, and to construct, operate and maintain a gas plant for heating, lighting and fuel and for all other purposes for which gas may be used and prescribing certain regulations and relations thereto.

Be it ordained by the Mayor and Councilmen of the City of Hutchinson, Kansas:

SECTION 1. That consent, permission and authority are hereby given and granted to Emerson Carey, K. E. Sentney, C. M. Williams, C. H. McBurney, A. W. Smith and J. S. George, their successors or assigns, to construct, run and operate for a period of fifty years from and after the publication of this ordinance, a single or double track street railway, with all necessary side-tracks, turnouts, switches and curves in and along the streets and avenues mentioned in Section 12 of this ordinance and upon such other streets and avenues of said city for which the City Council may hereafter grant permission, or where the owners of a majority of the front footage between the terminal points of the tracks upon such streets and avenues shall consent in writing to this Council to the construction and operation of a Street Railway thereon and to keep, maintain and operate thereon Street Railway cars and carriages in the manner and in accordance with the conditions and provisions hereinafter set forth.

SEC. 2. Such railway shall be operated by electric, overhead trolley system, or what may become the best method of electric propulsion. The erection of all poles, wires and other devices of
72 said grantees in the streets and avenues of said city for any of the purposes provided in this ordinance shall be made under the direction of the Committee on Streets and Alleys and said grantees shall remove and relocate any such poles, wires or other devices in any of the streets and avenues of said city whenever the Council shall, by resolution, demand such removal and relocation.

SEC. 3. The cars used on such street railway shall be first class in style and finish and shall be used to transport passengers and their ordinary baggage, mail, express matter, farm produce and such freight as can be conveniently handled and the common council of said city shall have the power hereafter to make such regulations for the running of such cars and the time of service thereof as the public safety and convenience may require and provide penalties for the violation thereof, provided that such regulations shall not require the running of a car over any street thereof oftener than

thirty minutes, except Main street, between the hours of 6 a. m. and 10 p. m.

SEC. 4. The track of such street railway shall be constructed on the center or side of the streets and avenues of said city, as the City council may direct and so as to conform to the established grades thereof, and so as not to unnecessarily obstruct or impede the free passage of such streets. Said City Council shall upon the request of the grantees herein, their successors or assigns, establish the grade of any street or avenue where none exists and said grantees, their successors or assigns shall then conform their railroad tracks to such grades. Said grantees or their successors or assigns shall upon request of this Council keep the space between its rails, turnouts and switches upon the streets of the city, free from dirt and filth and upon a failure to do so said Council shall have the right to cause or procure the same to be done and to collect the costs thereof from the said grantee, their successors or assigns. In case of the change of the grade of any street after said grantees shall have laid their tracks upon the same, any damage sustained by said grantees,
73 their successors or assigns, by reason thereof shall be assessed by Commissioners and collected and paid to said grantees, their successors and assigns, the same as other damages in such matters are assessed and collected.

SEC. 5. The track of such street railway shall be of uniform gauge, four feet, eight and one-half inches in width, and shall be constructed of a most approved "T" rail of such weight and pattern as not to interfere with paving up to the rails with any of the approved materials for modern paving. The face of the rails shall not be to exceed one-half inch above the surface of the pavement. The poles for overhead wires may be 35 feet high but must be straight, smooth and painted—the first seven feet black, balance white.

SEC. 6. The City Council of said city shall have the power to order and require any track or tracks of such street railway to be moved or set over whenever it shall be necessary for the purpose of grading, improving or repairing any street, alley or avenue in said city, or for the purpose of constructing or repairing any sewers or laying or repairing any gas or water mains or pipes; provided, that when such track shall be so moved, or set over on said streets at the request and for the accommodation and benefit of any person, company or corporation, such person, company or corporation shall pay the cost and expense thereof; provided, however, that no part thereof shall be chargeable to said city.

SEC. 7. The grantees herein, their successors or assigns shall be liable for all legal and consequential damages which may be sustained by any person by reason of the carelessness, negligence or want of ordinary care by said grantees, their successors or assigns or any of their agents or servants in the course of their employment.

SEC. 8. The rate of fare between the hours of 6 a. m. and 11 p. m. shall not exceed 5 cents per passenger for one continuous passage from any point on any of grantees' said railway line to any other point thereon in the city limits, provided that such continuous

passage shall be via the short line between starting point
74 and destination and provided, that when there is no through car between the passenger's starting point and destination, then such passenger shall be entitled to free transfer good on such car going to such destination; provided, further, that after 11 o'clock p. m. said fare may be 10 cents.

SEC. 9. The cars of such street railway shall be run in accordance with the following rules and regulations:

1. No car shall be run faster than the following rate of speed, viz.: On Main Street, between Avenue F and Fifth avenue, ten miles per hour, and fifteen miles per hour on any other portion of the line within the city limits.

2. Cars driven in the same direction shall not approach each other nearer than fifty feet, except in case of accident or when at or near station.

3. No car shall remain standing on any street unless attached to its power and in waiting for passengers.

4. No car shall be stopped on cross-walk nor in front of any intersecting streets, Except to avoid collision or damage or injury to persons or property, or to take on or let off passengers.

5. Conductors and motormen of cars shall use care and diligence to prevent injury to persons and upon appearance of danger to any person in or near the tracks the cars shall be stopped.

6. All proper care shall be used by conductors and motormen to prevent injury to teams, carriages, buggies, wagons and other vehicles.

7. It shall be lawful for any street car conductor or motorman or agent of said grantees, their successors or assigns, to eject from the cars any person acting in a rude, insolent, boisterous or drunken manner upon any of their cars, or any other property, or may call to their aid any of the police force in the city to arrest any person so offending.

8. In case of fire, cars shall be stopped when so ordered by the chief of the fire department of said city, or by any of his assistants.

75 SEC. 10. The cars of the said grantees herein, their successors and assigns shall be entitled to the track and when any team or vehicle shall meet or be overtaken by such cars, such team or vehicle shall give way to such cars, except that of funeral processions and public parades while crossing said tracks shall be entitled to preference over such cars.

SEC. 11. As respects the permission and authority hereby granted to construct and operate such street railway, said grantees, their successors and assigns shall construct and operate the same at their own risk and in no case shall the City of Hutchinson be held responsible to said grantees their successors or assigns, or to any person or property owner of said city for any damages arising from the granting of the privileges herein set out or from the construction or operation of such street railway.

SEC. 12. The grantees herein, their successors or assigns shall con-

struct and operate the following lines of street railway on the following routes to-wit:

Main street, from Avenue F to the city limits upon the north, Avenue A east to Bismark street, and may construct and operate said road upon said Avenue A east to city limits and from said Avenue A upon any street most feasible to the cemetery and to the State Industrial Reformatory. And shall operate the same upon Fourth avenue from Main street to Cleveland street, and may operate the same upon Fourth avenue to the city limits.

SEC. 13. As a condition precedent to the vesting in the said Emerson Carey, K. E. Sentney, C. M. Williams, C. H. McBurney, A. W. Smith, J. S. George, their successors and assigns of the rights and privileges confer-ed by this ordinance, said grantees, their successors or assigns, shall, within thirty days make and file with the Clerk of the City of Hutchinson, written acceptance of the provisions of this ordinance.

SEC. 14. The said grantees, their successors or assigns shall have the right to lay "T" rails on the streets and avenues of the
76 City of Hutchinson as named in this ordinance and all streets used by said grantees, upon the following conditions and restrictions:

That the said grantees, their successors and assigns shall fill up the space between the rails and between turn-outs and switches with good packing dirt or gravel and to the distance of one foot on each side of the tracks so that the level of the ground shall be within half inch of the top of the rails, said ground being packed firmly so as to make a good, hard roadway and easy to cross with teams and vehicles and in paved districts, to restore pavement to the condition it was in before the laying of the rails. Surface of the rails to be kept not to exceed one-half inch above the pavement and if said city shall deem it necessary, said grantees, their successors and assigns shall plank street and alley crossings in accordance with the order of the council and in case said grantees, their successors and assigns shall fail to perform any of the restrictions, provisions and conditions herein enumerated, the city may perform the same and recover cost thereof from the said grantees, their successors and assigns.

SEC. 15. In consideration of the benefits to be derived and to accrue from the construction and operation of such street railway in the City of Hutchinson, said grantees, their successors and assigns are hereby relieved and exempted from the payment of any and all license or license fees which otherwise might be levied or imposed by the council of said city.

SEC. 16. If the said grantees, their successors or assigns or any of their agents or representatives shall violate any of the provisions of section 9 of this ordinance, they shall be fined not less than $1.00 nor more than $50.00 for each offense.

SEC. 17 If the said grantees, their successors or assigns shall fail, neglect or refuse to operate said street railway system over any of its tracks for a period of ninety days at any one time after written notice from the City, Council so to do, then all rights of said grantees,

their successors and assigns to and over any street in which
77 they may fail to operate their said cars, may be forfeited by the council of said city; provided this section shall have no application if the failure to operate said railway shall be caused by strikes, riots or other causes not under the control of the city.

SEC. 18. The grantees, their successors and assigns shall keep and maintain their general offices, repair shops of said railway in the City of Hutchinson, Kansas.

SEC. 19. It is understood that the grantees herein, or persons whom they represent has purchased the franchise including all rights and privileges of the Hutchinson Street Railway Company, and as a condition precedent to the exercise by said grantees, their successors and assigns of this within franchise, the said grantees, their successors and assigns are to procure the surrender of the franchise of the Hutchinson Street Railway Company, together with all rights and privileges conferred thereunder to the City of Hutchinson, or shall file with the City of Hutchinson a written evidence of the transfer by the Hutchinson Street Railway Company to the grantees, their successors and assigns all the rights and privileges conferred to the said Hutchinson Street Railway Company by the City of Hutchinson, it being intended that the franchise and privilege herein granted shall in no way interfere with the franchise and privilege heretofore granted to the Hutchinson Street Railway Company, so as to render the City of Hutchinson liable for any damage by reason of any conflicting rights between the grantees herein, their successors and assigns and the said The Hutchinson Street Railway Company by reason of the rights and privileges herein granted to the grantees their successors and assigns.

SEC. 20. The said grantees herein, their successors and assigns, shall commence the construction of the electric railway hereinbefore designated, located and described within six months from the date of the publication of this ordinance, and shall have the same completed and in actual operation in said city within one year, provided that
78 if said construction be not commenced within said time and if said line be not completed and in operation within said one year, then this ordinance shall without further action become inoperative and void and all rights and privileges conferred by this ordinance shall revert to said City of Hutchinson, Kansas, unless upon good cause, said city may by resolution grant further time for the extension of said work.

SEC. 21. There is hereby given and granted to the said Emerson Carey, K. E. Sentney, C. M. Williams, C. H. McBurney, A. W. Smith and J. S. George in connection with the privileges and rights conferred in the above and foregoing section, the further right and privilege for the term of twenty years from the date of the passage and approval of this ordinance of supplying the City of Hutchinson, Reno County, and the inhabitants of said city and county with electric current for electric light and power and for all other purposes for which electric current may be used and for such purpose said grantees are here authorized and permitted to erect poles and wires throughout all the streets, alleys, lanes, and public grounds and

to cross any stream or bridge in said city to erect and maintain all engines, machinery and other appliances necessary for the conducting of said work and for the supplying of said city, said Reno county and the inhabitants of said city and county with electric light and power.

SEC. 22. The said grantees herein their successors or assigns shall not at any time use the poles, wire and other appliances provided for in this ordinance in such a manner as to hinder or obstruct the commerce or trade of the City of Hutchinson, nor obstruct the proper use of the streets, alleys, lanes, avenues, public grounds or other public places excepting as may be necessary temporarily to make repairs, or extensions or improvements to its property and works.

SEC. 23. That in addition to the rights and privileges heretofore granted, there is granted to said Emerson Carey, K. E. Sentney, C. M. Williams, C. H. McBurney, A. W. Smith and J. S. George, their successors and assigns, the further right and privilege
79 for the term of twenty years from the date of the passage and approving of this ordinance of supplying the City of Hutchinson, Reno County, Kansas, and the inhabitants thereof with gas, either manufactured or natural and for such purpose shall have the right and privilege to construct and maintain mains, pipes and other conduits in the streets and alleys of said city.

SEC. 24. That the grantees herein their successors and assigns, in laying the mains and pipes in the streets and alleys in said city shall lay the same below the surface of the ground and shall suitably guard and protect all excavations for such purpose so as to prevent injury to person and property by reason thereof.

SEC. 25. That the excavation made by reason of the laying of such pipes and mains after the same shall have been laid, shall be carefully filled and replaced in as good condition as before and as soon as possible thereafter as the circumstances will permit.

SEC. 26. That the said grantees, their successors and assigns shall not, at any time so construct any of their electric light wires and poles and other appliances or their gas mains or pipes in such a manner as to hinder or obstruct commerce or trade of the city, nor obstruct the proper use of the streets, alleys, lanes, or other public grounds of said city, excepting as may be necessary to temporarily make repairs, extensions or improvements to its work.

SEC. 27. The said grantees herein, their successors and assigns shall at all times repair and make good any injuries which it may create in the erection, construction and maintenance or operation of the several works provided for in this ordinance to any of the streets, alleys, lanes, public grounds or other public places under the control of the city, or any sidewalks, gutters, or other improvements in the streets, alleys and avenues of said city.

SEC. 28. The City of Hutchinson hereby agrees that it will pass all necessary ordinances for the protection of the property of the said grantees herein, their successors and assigns of their street railway and its machinery, electric works and gas works, and to pre-
80 vent interference with the poles and wires, or the convenient construction, maintenance and operation of the same.

SEC. 29. This ordinance shall be in force and take effect from and after its publication once in The Hutchinson News.

Approved December 15, 1905.

J. P. HARSHA, *Mayor*, Mayor.

Attest: S. F. JOHNSON, *City Clerk*.

81 Endorsed: No. 1101. Circuit Court of the United States, District of Kansas, Second Division. Water, Light & Gas Company, *v.* City of Hutchinson, *et al.* Amended Bill of Complaint. Filed Jan'y 15, 1906. Geo. F. Sharitt, Clerk. H. Whiteside, H. S. Lewis, Waggener, Doster & Orr, For Complainant.

82 In the Circuit Court of the United States for the District of Kansas, Second Division.

THE WATER, LIGHT & GAS COMPANY, a Corporation, Complainant,

v.

THE CITY OF HUTCHINSON, J. P. HARSHA, Mayor; J. E. HOSTETTER, L. A. BEEBE, M. I. HULTS, C. W. OSWALD, F. G. DELANO, JNO. BLAIR, W. E. LONG, W. S. THOMPSON, C. HOWARD, F. MCDERMED, C. O'NEAL and C. I. PARKS, Councilmen; and S. F. JOHNSON, City Clerk of said City, and EMERSON CAREY, K. E. SENTNEY, C. M. WILLIAMS, C. H. MCBURNEY, A. W. SMITH, and J. S. GEORGE, Defendants.

The Joint and Several Demurrer of Each of the Above Named Defendants to the Amended Bill of Complaint of The Water, Light & Gas Company, the Above Named Plaintiff.

These defendants respectfully, by protestation, not confessing or acknowledging all of the matters and things in said plaintiff's bill to be true in such manner and form as the same are therein set forth and alleged, demur thereto, and for cause of demurrer show, that the said plaintiff has not in and by the said bill made or stated any such cause or doth or ought to entitle him to any relief as is thereby sought and prayed for against these defendants.

Wherefore, and for divers other good causes of demurrer appearing in said bill, these defendants demur thereto and humbly demand the judgment of this court whether they shall be compelled to make any further or other answer to said bill, and prays to be hence dismissed with their costs and charges in this behalf most wrongfully sustained.

J. P. HARSHA ET AL.,

By Their Attorneys, A. C. MALLOY &

PRIGG & WILLIAMS.

83 DISTRICT OF KANSAS, *County of Shawnee, ss:*

C. M. Williams makes solemn oath and says he is one of the above named defendants, and that the foregoing demurrer is not interposed for delay, and that the same is true in point of fact.

C. M. WILLIAMS.

Subscribed and sworn to before me this 15th day of January, 1906.

GEO. F. SHARITT, *Clerk.* [SEAL.]

We hereby certify that in our opinion the foregoing demurrer is well founded in point of law.

A. C. MALLOY &
PRIGG & WILLIAMS,
Attorneys.

Endorsed: No. 1101. Water, Light & Gas Co., *v.* City of Hutchinson, *et al.* Demurrer to amended Bill. Filed Jan'y 15/06. Geo. F. Sharitt, Clerk.

84 In the Circuit Court of the United States, District of Kansas, Second Division.

No. 1101. Equity.

THE WATER, LIGHT & GAS CO., a Corporation, Complainant,
v.
THE CITY OF HUTCHINSON ET AL., Defendants.

Memoranda of Decision on Demurrer to Amended Bill of Complaint.

As shown by the bill of complaint presented, defendant, the city of Hutchinson, a city of the second class under the laws of this state, by ordinance number 402 of that city, duly passed and approved March 5, 1897, and thereafter duly published, upon sufficient consideration entered into a contract with the Hutchinson Water, Light and Power Company, a domestic corporation of this state, to supply said city and its inhabitants with water and light for a period of twenty years. Said contract, as shown from the terms of the ordinance, was a compromise and adjustment of rights arising between the parties under the terms of prior contracts theretofore entered into and then existing. The preamble to and so much of said ordinance number 402 as is deemed material to the consideration of the controversy now arising for decision, reads as follows:

"An ordinance to provide for a system of water works, electric light works and gas works, and supply of water, electric current and gas to the city of Hutchinson and the inhabitants thereof.

"Whereas, The Hutchinson Water, Light and Power Company is the owner of certain exclusive franchises and contracts with the city

of Hutchinson, under which and in accordance with which the said company has expended large sums of money in constructing and building water works, electric light works and gas works, and in building up the business of said works, which are now in successful operation in supplying the city of Hutchinson and the inhabitants thereof with water, electric current and gas for all purposes for which water, electric current and gas is used; and

"Whereas, The city of Hutchinson is desirous of modifying and changing said franchise and contracts to the advantage of said city of Hutchinson without cancelling or abridging any of the rights or privileges vested in said company by reason of its labor and investments under said franchises and contracts other than the modifications hereinafter specified.

"Therefore, In consideration of the surrender of all the existing contracts and franchises of said company with the city of Hutchinson, excepting as hereinafter specified,

"Be it ordained by the mayor and council of the city of Hutchinson, Kansas:

"SECTION 1. That there is hereby given and granted to the Hutchinson Water, Light and Power Company, of Hutchinson, Kansas, its successors or assigns, the exclusive right and privileges for the term of twenty years from the date of the passage and approval of this ordinance of supplying the city of Hutchinson, Reno county, Kansas, and the inhabitants thereof, by a system of works with water for the prevention and extinguishment of fires and for all other purposes for which water may be used, (said water works to be the Holly system); with electric current for electric light and power, and for all other purposes for which electric current may be used, except power for the operation of street railways, which exception shall not prevent said Water, Light and Power Company from furnishing electric currents to street railways for any and all purposes; and with gas for lighting, heating and for fuel, and for all other purposes for which gas may be used, in accordance with the terms and conditions set forth in this ordinance.

"SECTION 2. That said Hutchinson Water, Light and Power Co., its successors or assigns, is hereby authorized to maintain, extend and operate said works in or adjacent to the city of Hutchinson, to receive, take store, purify, conduct and distribute said water, electric current and gas through said city, to construct and extend aqueducts, mains, pipes and erect poles and wires through all the streets, alleys, lanes and public grounds and to cross any stream or bridge in said city, to erect and maintain all engines machinery and other appliances necessary for conducting any of said works, and for supplying said city and the inhabitants thereof with water, electric current and gas for the purposes herein mentioned, and for such purposes the said Hutchinson Water, Light and Power Company, its successors or assigns, shall have the right, and is hereby authorized to use the streets, alleys, avenues, lanes and public grounds in or adjacent to said city, and shall have the right to take up any pavements or sidewalks, and make such excavations therein as may be

necessary to lay, repair and maintain aqueducts, mains and pipes below the surface of the ground for conveying and distributing the water and gas, and for erecting poles for electric wires as aforesaid;

"SECTION 4. The said city of Hutchinson hereby agrees to rent, and does rent for fire protection, the one hundred and eighty-five (185) fire hydrants now located on the mains of the said water works from the Hutchinson Water, Light and Power Company, its successors or assigns, for the full term of this contract, and the said city of Hutchinson will pay for the use of said one hundred and eighty-five (185) hydrants an annual rent of $6,000, payable semi-annually on the first days of May and November of each year,
86 less $1,000 per year rebate for two years from the passage of this ordinance, payments to be made as hereinafter specified. For all hydrants located on extensions hereafter ordered by the city council, as specified in section 3 of this ordinance the city of Hutchinson agrees to pay thirty-six dollars ($36.00) per annum for each hydrant so located, payments to be made as hereinafter specified. The said Hutchinson Water, Light and Power Company shall furnish water for sprinkling the streets of the city of Hutchinson at the rate of $12.50 per month for each wagon or sprinkler used in sprinkling said streets for one year from and after the date of the passage and approval of this ordinance, and for the next succeeding year, or second year after the passage and approval of this ordinance, the said Hutchinson Water, Light and Power Company shall furnish water for such street sprinkling purpose at the rate of $15.00 per month for each wagon or sprinkler used in sprinkling said streets.

"SECTION 8. The city of Hutchinson shall have the right to purchase the works, property and business created, acquired, constructed and contemplated under this contract at any time after the expiration of ten years from the adoption of this ordinance, upon giving one year's notice to the owners of said property and upon paying to said owners a fair value for the same as may be mutually agreed, or fixed by a court of competent jurisdiction. Said one year's notice may be given at any time after the expiration of nine years from the date of the passage and approval of this ordinance.

SECTION 13. The city of Hutchinson hereby agrees that it will pass all necessary ordinances for the protection of the property of the said water works, electric light works and gas works; to prevent the contamination of the water supply; to prevent the waste of water from the hydrants, mains and pipes; to prevent all interference with its poles and wires, and that it will upon request of the said Hutchinson Water, Light & Power Company, its successors or assigns, to proceed without delay to exercise its rights under the statutes of the state of Kansas, in the matter of the condemnation of any lot, parcel or piece of ground, or of water, or water privileges that may be necessary to the proper and convenient construction, maintenance and operation of the system of water, gas and electric light works contemplated in this ordinance.

"Provided, That the said Hutchinson Water, Light and Power Company, its successors or assigns, pay all costs and expense incident thereto, including the cost of all property so condemned, and,

"Provided, further, That the right to free and exclusive control of all property so condemned shall rest and remain in the said Hutchinson Water, Light and Power Company, its successors or assigns.

"SECTION 14. If the said Hutchinson Water, Light and Power Company, its successors or assigns, shall refuse to operate the water system contemplated in this ordinance at any time, that part of this franchise relating to the water system shall be forfeited, unless such failure to operate is unavoidable or due to accident.

"SECTION 15. Nothing in this ordinance shall prevent any person or company from manufacturing gas, electricity or any other material for his own or their own use for light or fuel, but in no case shall such persons supply others with gas or electric current for any purpose."

87 Thereafter, complainant in this suit, a corporation of New Jersey, by purchase became and now is the lawful successor in right of all the property, franchises and rights of the domestic contracting company. On the 15th day of December, 1905, the defendant city of Hutchinson duly passed an ordinance number 651 of the city, contracting with and granting unto defendants Emerson Carey, K. E. Sentney, C. M. Williams, C. H. McBurney, A. W. Smith and J. S. George, their successors and assigns, certain rights and privileges of constructing and operating a line of street railway in said city and of furnishing said city and its inhabitants with electric light and gas for light, power and heating purposes. So much of said ordinance as is deemed material here reads as follows:

"An ordinance granting permission and authority to Emerson Carey, K. E. Sentney, C. M. Williams, C. H. McBurney, A. W. Smith and J. S. George, their successors or assigns, to construct and operate a street railway in and along the streets and avenues of the city of Hutchinson, Reno county, Kansas, and to construct, operate and maintain an electric plant for the purpose of furnishing electric current for electric lights and power for all other purposes for which electric current may be used, and to construct, operate and maintain a gas plant for heating, lighting and fuel and for all other purposes for which gas may be used and prescribing certain regulations and relations thereto.

"Be it ordained by the Mayor and Councilmen of the city of Hutchinson, Kansas:

"SECTION 1. That consent, permission and authority are hereby given and granted to Emerson Carey, K. E. Sentney, C. M. Williams, C. H. McBurney, A. W. Smith and J. S. George, their successors or assigns, to construct, run and operate for a period of fifty years from and after the publication of this ordinance, a single or double track street railway, with all necessary sidetracks turnouts, switches and curves in and along the streets and avenues mentioned in section 12 of this ordinance and upon such other streets and avenues of said city for which the city council may hereafter grant permission, or where the owners of a majority of the front footage between the terminal points of the tracks upon such streets and avenues shall con-

sent in writing to this council to the construction and operation of a street railway thereon and to keep, maintain and operate thereon street railway cars and carriages in the manner and in accordance with the conditions and provisions hereinafter set forth.

"SEC. 21. There is hereby given and granted to the said Emerson Carey, K. E. Sentney, C. M. Williams, C. H. McBurney, A. W. Smith and J. S. George in connection with the privileges and rights conferred in the above and foregoing sections, the further right and privilege for the term of twenty years from the date of the passage and approval of this ordinance of supplying the city of Hutchinson, Reno county, and the inhabitants of said city and county with electric current for electric light and power and for all other purposes for which electric current may be used and for such purpose said grantees are here authorized and permitted to erect poles and wires through all the streets, alleys, lanes and public grounds and to cross
88 any stream or bridge in said city to erect and maintain all engines, machinery and other appliances necessary for the conducting of said work and for the supplying of said city, said Reno county and the inhabitants of said city and county with electric light and power.

"SEC. 22. The said grantees herein, their successors or assigns shall not at any time use the poles, wire and other appliances provided for in this ordinance in such a manner as to hinder or obstruct the commerce or trade of the city of Hutchinson, nor obstruct the proper use of the streets, alleys, lanes, avenues public grounds or other public places excepting as may be necessary temporarily to make repairs, or extensions or improvements to its property and works.

"SEC. 23. That in addition to the rights and privileges heretofore granted, there is granted to said Emerson Carey, K. E. Sentney, C. M. Williams, C. H. McBurney, A. W. Smith and J. S. George, their successors and assigns, the further right and privilege for the term of twenty years from the date of the passage and approving of this ordinance of supplying the city of Hutchinson, Reno county, Kansas, and the inhabitants thereof with gas, either manufactured or natural and for such purpose shall have the right and privilege to construct and maintain mains, pipes and other conduits in the streets and alleys of said city.

"SEC. 28. The city of Hutchinson hereby agrees that it will pass all necessary ordinances for the protection of the property of the said grantees herein, their successors and assigns of their street railway and its machinery, electric works and gas works, and to prevent interference with the poles and wires, or the convenient construction, maintenance and operation of the same."

This suit was brought to enjoin and restrain the defendant city, its mayor and council, and the persons named contracting with the defendant city by the terms of ordinance number 651, from in any way proceeding under the terms of said ordinance toward the doing of any public service which complainant might do under the terms of ordinance number 402, upon the ground that complainant has the exclusive right for the period of time mentioned therein, twenty

years, which time has not expired, to furnish such public service to the city and inhabitants thereof. The prayer of the bill reads:

"That a writ of injunction be issued commanding the defendants and all persons claiming to act under their authority and direction to refrain and desist from doing any acts or exercising any pretenses of right to act under the aforesaid ordinance number 651 granted to defendants as aforesaid which will in any wise affect the exclusive rights of your orator to furnish the said city and its inhabitants with electric or gas light for lighting and heating purposes or power except for street cars and electric railways, and also from making or proceeding to make any contract for furnishing light or gas to said city and its inhabitants until the expiration of the aforesaid franchises and contracts of your orator with said city."

Defendants have appeared to this bill and demur for want of equity.

89 The questions arising for determination are: (1) Did the city, by ordinance number 402, grant or attempt to grant unto the corporation therein named the exclusive right for the period of time therein named of furnishing the city and its inhabitants with electric light and gas for heating, light and fuel, such period of time not having expired: (2) if so, did the city possess the power inherent or under the law of its creation to make an *exclusive* contract, binding itself and inhabitants to receive and pay for water, light, heat and power from the corporation there contracted with for the period of twenty years to the exclusion of all others?

If these questions are answered in the affirmative, then it is clear the demurrer must be overruled and complainant may maintain this suit to protect its franchises and contract rights from violation at the hands of the defendants. Jersey City Gas. Co. *v.* Dwight, 29 N. J. Eq. 242; City of Newport *v.* Newport Light Co., 84 Ky. 166.

While the exclusive right of complainant to furnish the defendant city with water under its franchise is not here challenged, and while complainant by the terms of ordinance number 402 does not obligate itself to the city to furnish light, heat or power, yet, assuming for the purpose of decision the contract made by ordinance number 402 between the defendant city and complainant as successor of the Hutchinson Water, Light and Power Company, is in terms exclusive, and was intended to be so by the city at the time it was made, the important and principal inquiry still remains, did the city at the time the ordinance was passed possess the power to make a contract binding and exclusive of all others for the period of twenty years? If so, it follows, of necessity, the demurrer must be overruled. If not, it should be sustained, for the sole purpose of this suit, as has been seen, is to nullify the action of the city in the making of the subsequent contract upon the one ground alone of the exclusive character of the former grant.

In the light of authority it must be conceded the power to make the exclusive contract contended for by complainant resides
90 in the state and may be delegated by it to municipal agent, such as the defendant city, and when delegated the city becomes possessed of the power by contract to exclude not only other

persons and corporations thereafter desiring to contract with it for the performance of a public service for a given period of time, but also to obligate itself during such term not to undertake the performance of such public service, and such contract rights will receive protection from the courts under the federal constitution. Walla Walla *v.* Walla Walla Water Co., 172 U. S. 1.

It therefore becomes important in this inquiry to determine first of all, the precise power inherent in or conferred upon the defendant city to contract with the Hutchinson, Light and Power Company.

The defendant city as a municipal corporation of this state is purely a creation of statutory law. Our constitution recognizes but does not confer any power upon cities of the state. Section 5, article 12, provides:

"Provision shall be made by general law for the organization of cities, towns and villages and their power of taxation, assessment, borrowing money, contracting debts and loaning their credit, shall be so restricted as to prevent the abuse of such power."

As the full measure of power reserved by the state, unsurrendered to the general government upon its admission into the Union, remains in and can be exercised alone by the state, except as such power has been by the legislature of the state delegated to its municipal corporations and other agents, as a necessary and inevitable sequence it must follow, there is no inherent power in the defendant city to make the contract claimed, Citizens' St. Railway *v.* Detroit Railway, 171 U. S. 48. And as the organic law of the state confers no power upon the cities of the state, but merely empowers the legislative branch of the state to organize cities under general laws and to restrict their powers, the power of the defendant city to make the exclusive contract claimed by complainant to exist must be found, if at all, either in the charter of the contracting company or in
91 the provisions of the second class cities' act of this state in force at the time of the passage of the ordinance, for this act is the organic law of the city.

What was the measure of power conferred upon the corporation and the city, and how must the statutory law granting such power be construed by the courts? The contracting company having been created under the general incorporation laws of the state did have the power "To enter into any obligation or contract essential to the transaction of its ordinary affairs." Sec. 25, Chap. 23, Art. 3, Gen. Stat. 1901. While this grant of power might suffice to enable the company to enter into an exclusive contract with the city, it is not contended, and cannot be contended, it conferred any such power upon the city to so contract. Hence, the power claimed to have been conferred upon the city must be found, if it exists, in the organic law of the city, that is in the second class cities' act, and such amendments thereto as were in force at the date of the making of the contract in question.

Looking now to this act we find the following statutory provisions bearing upon this question. Section 35 of the act provides the general powers of the mayor and council of such city, and reads as follows:

"The mayor and council of each city governed by this act shall have the care, management and control of the city, and its finances, and shall have power to enact, ordain, alter or repeal any and all ordinances not repugnant to the constitution and laws of this state, and such as it shall deem expedient for the good government of the city, the preservation of the peace and good order, the suppression of vice and immorality, the benefit of trade and commerce, and the health of the inhabitants thereof, and such other ordinances, rules and regulations as may be necessary to carry such power into effect."

Section 65 of the act provides:

"The council may provide for and regulate the lighting of the streets, and the erection of lamp posts, and the numbering of the buildings in the city, and the construction of sewers; and the counsel shall have power to make contracts with any person, company or association for such purposes, and give such person, company or association the privilege of furnishing light for the streets, lanes or alleys of said city for any length of time not exceeding twenty one years."

Section 83 of the act provides:

"That cities of the second class of the state of Kansas are hereby granted full power and authority, on behalf of said cities
92 to purchase, procure, provide and contract for the construction of and construct water works, electric light and gas plants, for the purpose of supplying such cities and the inhabitants thereof with water, light and gas for domestic use and any and all other purposes."

Judge Dillon in his work on Municipal Corporations, 4th ed., section 89, says:

"It is a general and undisputed proposition of law that a municipal corporation possesses and can exercise the following powers, and no others: 1. Those granted in express words; 2. Those necessarily or fairly implied in or incident to the powers expressly granted; 3. Those essential to the declared objects and purposes of the corporation,—not simply convenient, but indispensable. Any fair reasonable doubt concerning the existence of the power is resolved by the courts against the corporation, and the power is denied. Of every municipal corporation the charter or statute by which it is created is its organic act. Neither the corporation nor its officers can do any act, or make any contract, or incur any liability, not authorized thereby, or by some legislative act applicable thereto. All acts beyond the scope of the powers granted are void."

In Minturn *v.* Larue *et al.*, 23 How. 435, Mr. Justice Nelson delivering the opinion of the court, says:

"It is a well settled rule of construction of grants by the legislature to corporations, whether public or private, that only such powers and rights can be exercised under them as are clearly comprehended within the words of the act or derived therefrom by necessary implication, regard being had to the objects of the grant. Any ambiguity or doubt arising out of the terms used by the legislature must be resolved in favor of the public."

Judge Jackson in Grand Rapids E. L. & P. Co. *v.* Grand Rapids E. E. L. & F. G. Co., 33 Fed., 659, says:

"To confer *exclusive* rights and privileges, either in the streets of a city or in the public highways, *necessarily involves the assertion and exercise of exclusive powers and control over the same.* Nothing short of the *whole sovereign power* of the state can confer *exclusive* rights and privileges in public streets, dedicated or acquired for *public* use, and which are held in *trust* for the *public at large.* This brings us directly up to the inquiry whether the legislature of Michigan has delegated to the city of Grand Rapids the state's sovereign power and control over the streets of that municipality. If the charter powers of the city have invested it or its common council with the *whole sovereign* power and exclusive control over the streets within its limits, it might lawfully confer upon the complainant the exclusive right of user, which the ordinance of 1880 undertook to grant. If, however, the city or its common council possessed no such exclusive power and control, then the grant which it attempted to make to complainant was "*ultra vires,*" and therefore void, so far as it purports to confer exclusive privileges in or over the streets of the city."

Mr. Justice McKenna, delivering the opinion of the court in Citizens' St. Railway *v.* Detroit Railway, 171 U. S., 48, says:

"It is clear that the statute did not explicitly and directly
93 confer the power on the municipality to grant an exclusive privilege to occupy its streets for railway purposes. It is urged, however, that such power is to be inferred from the provision which requires the consent of the municipal authorities to the construction of a railway under such terms as they may prescribe, combined with the provisions of the constitution, which, if they do not confer a power independent of the legislature, strongly provide for and intend local government. The argument is strong, and all of its strength has been presented and is appreciated, but there exist considerations of countervailing and superior strength. That such power must be given in language explicit and express, or necessarily to be implied from other powers, is now firmly fixed. There were many reasons which urged to this—reasons which flow from the nature of the municipal trust—even from the nature of the legislative trust, and those which, without the clearest intention explicitly declared, insistently forbid that the future should be committed and bound by the conditions of the present time, and functions delegated for public purposes be paralyzed in their exercise by the existence of exclusive privileges. The rule and the reason for it are expressed in Minturn *v.* Laue, 23 How. 435; Wright *v.* Nagle, 101 U. S. 791; State *v.* Cincinnati Gas Light and Coke Co., 18 Ohio St. 262; Parkhurst *v.* Salem, 32 Pac. Rep. 304; Saginaw Gas Light Co. *v.* Saginaw, 28 Fed. Rep. 529, decided by Mr. Justice Brown of this court; Long *v.* Duluth, 51 N. W. Rep. 913. See also Grand Rapids Electric Light and Power Co. *v.* Grand Rapids &c. Co., 33 Fed. Rep. 659, opinion delivered by Mr. Justice Jackson at circuit. As bearing on the rule, see also Oregon Railway & Navigation Co. *v.* Oregonian Railway Co.,

130 U. S. 1; Central Transportation Co. *v.* Pullman Palace Car Co., 139 U. S. 24.

"The power, therefore, must be granted in express words or necessarily to be implied. What does the latter mean? Mr. Justice Jackson, in Grand Rapid- &c. Power Co. *v.* Grand Rapid- &c., *supra*, says: * * * "that municipal corporations possess and can exercise only such powers as are 'granted in *express words*, or those *necessarily* or *fairly* implied, *in or incident to the powers expressly* conferred, *or those essential to the declared objects and purposes of the corporation, not simply convenient, but indispensable.*'"

Mr. Justice Brewer, delivering the opinion of the court in Jackson County Horse R. Co. *v.* Interstate Rapid Transit Ry. Co., 24 Fed. 307, says:

"The precise question is, had the city of Kansas the power to grant for a term of years the exclusive right to occupy its streets with street railroads? That question must be answered in the negative. Let me in the outset formulate two or three unquestioned propositions: (1) The legislature has, as the general representative of the public, the power, subject to specific constitutional limitations, to grant special privileges; (2) it may, with similar limitations, grant the like power to municipal corporations as to all matters of a purely municipal nature; but, (3) as the possession by one individual of a privilege not open to acquisition by others apparently conflicts with that equality of rights which is the underlying principle of social organization and popular government, he who claims such exclusive privilege must show clear warrant of title, if not also probable corresponding benefit to the public. Hence the familiar rule that charters, grants of franchises, privileges, etc., are to be construed in favor of the government. Doubts as to what is granted are resolved in favor of the grantor, or as often epigrammatically said, a doubt destroys a grant."

Judge Sanborn in the case of the Illinois Trust & Sav. Bank *v.* City of Arkansas City, 22 C. C. A., 179, says:

94 "The general rule is that the legislature alone has the power to make exclusive grants of this character, and that this authority does not vest in the municipality, unless it is expressly granted to it by its charter. It will be further conceded that, if a grant of a similar privilege in its streets, not exclusive, has been subsequently made by this city to another corporation, and that corporation was about to proceed to construct another system of water works in this city, neither the gas company nor the city itself could maintain a bill to enjoin such proceedings. Since it was beyond the power of the city to make the grant of the privilege exclusive, that portion of the grant would not sustain a bill to restrain the violation of its terms."

In the exercise of the sovereign reserved power possessed by the state under the constitution, state legislatures have in many cases granted exclusive rights, franchises and privileges, and such grants have been upheld and enforced as exclusive. New Orleans Gas Co. *v.* Louisiana Light Co. 115 U. S. 650; New Orleans Water-Works Co. *v.* River, *id.* 674; Louisville Gas Co. *v.* Citizens' Gas Co. *id.* 683;

Tammany Water W'ks. *v.* N. O. Water W'ks., 120 U. S. 64. But it is quite clear from a consideration of the fundamental principles of government and an examination of the adjudicated cases, defendant city under our constitution possessed neither the inherent power to make the exclusive contract claimed by complainant, nor did the legislature of the state confer, or attempt to confer upon it, such plenary power, under the statutory provisions quoted, from the organic law of the city. Before the contention of complainant in this suit to the exclusive right claimed may be upheld, it must appear the legislature of the state, in express terms, or by necessary and inevitable implication, delegated to defendant city such sovereign and plenary power as once exercised by it exhausted the power to further contract in that regard during the life of the grant. This, as has been seen, it did not do. There are cases in actual or apparent conflict with the view here expressed, notably, City of Newport *v.* The Newport Light Company *et al.*, 84 Ky. 166. This case, however, was reviewed by Judge Brown at the circuit in Saginaw Gas Light Co. *v.* City of Saginaw, 28 Fed. 529, and its reasoning disapproved. It is in conflict with the very great weight of authority and its argument is inconclusive.

95 Again it is thought by solicitors for complainant in this suit the recent case of California Reduction Co. *v.* Sanitary Reduction Works, decided by the Supreme Court, Nov. 27, 1905, is authority for the position taken by complainant here. In that case the supervisors of the city of San Francisco by ordinance granted to one F. E. Sharon, his associates and assigns, the exclusive right for a term of fifty years to handle and reduce the garbage and refuse of that city. This grant was upheld and defendants assuming to act under a subsequent grant made by the city were enjoined. From an examination of that case it is seen section 11 of article 11 of the constitution of that state provides:

"Any county, city, town or township may make and enforce within its limits all such local police, sanitary and other regulations as are not in conflict with general laws."

By virtue of this provision of the organic law of the state the full sovereign power with relation to the subject matter of the grant was delegated to the city of San Francisco to be exercised in such manner as in the judgment of the supervisors of the city might seem proper, except in so far as any attempt to exercise the power conferred might conflict with the general laws of the state. The holding was, the power exercised by the city in the making of the grant in question was not prohibited by the general laws of the state, hence, valid. To distinguish, there, the city possessed plenary power derived from the organic law of the state over the subject matter of the grant, except as its attempted exercise came in conflict with the general laws of the state. Here the organic law of the state confers no power upon the city, and the city can exercise no power not expressly or by necessary implication granted to it by the legislature.

This view of the controversy renders unnecessary a decision of the other question arising in the case, for it is apparent if the city had no

power to grant the exclusive right claimed by complainant, such right if granted in terms would be void as to its exclusive feature, and would afford complainant no right to enjoin the further
96 exercise of the power conferred upon the city.

It follows, the demurrer must be sustained. It is so ordered.

JOHN C. POLLOCK, *Judge.*

Topeka, Jan'y 27th, 1906.

Endorsed: No. 1101. Opinion. Filed Jan'y 29, 1906. Geo. F. Sharitt, Clerk. By J. F. Shearman, D. C.

97 In the Circuit Court of the United States, District of Kansas, Second Division.

THE WATER, LIGHT & GAS CO., of Hutchinson, Kansas, Plaintiff,

vs.

THE CITY OF HUTCHINSON ET AL., Defendants.

Journal Entry.

This cause coming on for hearing, on this the 15th day of March, 1906, the same being a regular day of the March 1906 term of the Circuit Court of the United States, District of Kansas, Second Division, the Honorable John C. Pollock, Judge of said Court, presiding. The plaintiff appeared by the Honorable H. Whiteside, Frank Doster and Fairchild & Lewis, its Attorneys, and the defendants appeared by the Honorable A. C. Malloy and Prigg & Williams, their Attorneys. Whereupon said cause came on to be heard upon the amended bill of the plaintiff, and its application for a temporary order of injunction thereunder, and the demurrer of the defendants to the amended bill for want of equity. After due notice being given in the premises and the argument of counsel, the Court doth sustain the demurrer filed by the defendants to the amended bill for want of equity in said bill, to which judgment complainant then and there excepted and its exception is allowed, and as a consequence of the Court holding that the demurrer to the said amended bill is good, the application of the plaintiff for a temporary order of injunction is by the Court denied, to which ruling of the Court, the plaintiff did then and there except and its exceptions was allowed. Thereupon the plaintiff moved the Court that it issue and allow a temporary order of restraint against the defendant, from doing the acts complained of in the bill, the execution of which is al-
98 leged to be threatened, pending the appeal of the defendants to the Supreme Court of the United States. The said plaintiff offering to make bond to secure the defendants against damage, with approved security in such sum as the Court would fix. After the arguments of counsel upon the merits of said motion, the same is by the Court overruled, to which the plaintiff then and there excepted and its exceptions was allowed. The plaintiff did not ask to amend its bill, but stood upon the allegations and averments therein.

Whereupon the defendants moved that the court dismiss the bill and action of plaintiff, and tax the cost of action to said plaintiff, which said motion was by the Court sustained, and the said bill and action together with the application for injunction, are by the Court finally dismissed and the costs of suit, in amount $—— was attached, to all of which the plaintiff excepted, and its exceptions allowed.

JOHN C. POLLOCK,
Judge Circuit Court.

Endorsed: No. 1101, Equity. Decree. Filed M'ch 15, 1906. Geo. F. Sharitt, Clerk. By J. F. Shearman, D. C.

99 In the Circuit Court of the United States, District of Kansas, Second Division.

No. 1101.

THE WATER, LIGHT & GAS COMPANY, Complainant,
vs.
THE CITY OF HUTCHINSON ET AL., Defendants.

Assignment of Errors.

Comes now Complainant in the above cause and files the following Assignment of Errors, upon which it will rely in its appeal made from the decrees and orders made by this Honorable Court on the 15th day of March, 1906, in the above entitled action.

1.

For sustaining the Demurrer of defendants for want of equity to the amended bill of complaint of complain-t*n*.

2.

For refusing the application of complainant for temporary order of injunction.

3.

For refusing complainant a permanent injunction against defendants as prayed for.

4.

For refusing complainant an order for restraint pending its appeal to the Supreme Court of the United States.

5.

For holding that the contract and franchises of complainant set out in its bill of complaint were not entitled to protection from the impairment threatened by defendants under the Constitution of the United States.

100 6.

For holding in effect that it was not inequitable under the Constitution of the United States and the law of the land, for the defendants to do and perform the acts sought to be restrained by complainant in its bill of complaint and set out as being threatened therein.

7.

Dismissing Complainant's Bill of Complaint finally and taxing the costs of suit to Complainant.

THE WATER, LIGHT & GAS CO.,
By H. WHITESIDE,
FAIRCHILD & LEWIS,
FRANK DOSTER,
Its Solicitors.

Endorsed: #1101, In Equity. Assignment of Errors. Filed M'ch 15, 1906. Geo. F. Sharitt, Clerk. By J. F. Shearman, D. C.

101 In the Circuit Court of the United States, District of Kansas, Second Division.

No. 1104.

THE WATER, LIGHT & GAS COMPANY, Complainant,
vs.
THE CITY OF HUTCHINSON ET AL., Defendants.

Petition for Allowance of Appeal with Supersedeas.

The above named complainant considers itself aggrieved by the orders and decrees made and entered in the above entitled cause on the 15th day of March, 1906, for the reasons specified in the assignment of Errors filed herein, does hereby appeal from the said orders and decrees to the Supreme Court of the United States and prays that this appeal be allowed and that a transcript of the record papers and proceedings upon said orders and decrees were made duly authenticated may be sent to the Supreme Court of the United States.

H. WHITESIDE,
FAIRCHILD & LEWIS, &
FRANK DOSTER,
Solicitors for Complainant.

Endorsed: 1101, in equity. Petition for appeal. Filed Mch. 15, 1906. Geo. F. Sharitt, Clerk, By J. F. Shearman, D. C.

102 In the Circuit Court of the United States, District of Kansas, Second Division.

THE WATER, LIGHT & GAS CO., Complainant,

vs.

J. P. HARSHA, Mayor; J. E. HOSTUTLER, L. A. BEEBE, M. I. HULTS, C. W. OSWALD, F. G. DELANO, JOHN BLAIR, W. E. LONG, W. S. THOMPSON, C. HOWARD, F. M. MCDERMED, C. O'NEAL, C. I. PARKS, Councilmen, and S. F. JOHNSON, City Clerk, EMERSON CAREY, K. E. SENTNEY, C. M. WILLIAMS, C. H. MCBURNEY, A. W. SMITH, and J. S. GEORGE, Defendants.

Supersedeas Bond.

Know all men by these presents: That we, The Water, Light & Gas Company, W. E. Hutchinson and The American Surety Company of New York, are held and firmly bound unto the above named defendants in the sum of $500, to be paid to the said defendants, or any of them, for the payment of which well and truly to be made, we bind ourselves, and each of us, and our heirs executors and administrators. Dated this the 15 day of March, 1906.

Whereas, the above named Water, Light & Gas Company has prosecuted an appeal to the Supreme Court of the United States to reverse the decree rendered in the above entitled suit by the Judge of the Circuit Court of the United States for the District of Kansas.

Now therefore the condition of this obligation is such that if the above named plaintiff shall prosecute said appeal to effect and answer all damage and cost, if it fail to make said appeal good, then this obligation shall be void, otherwise the same shall be
103 and remain in full force.

THE WATER, LIGHT & GAS CO.,
By W. E. HUTCHINSON, *P't.*

[Seal American Surety Co. of N. Y.]

THE AMERICAN SURETY CO. OF NEW YORK,
By A. W. EAGAN, *Resident Vice Pres't.*
Attest: L. E. FONTRON, *Res. Ass't Sec'y.*

Approved:
JOHN C. POLLOCK, *Circuit Judge.*

Extract from the Record Book of the Board of Trustees of the American Surety Company of New York.

"The regular quarterly meeting of the Board of Trustees of the American Surety Company of New York was held at the Company's office No. 100 Broadway, in the City of New York, on Wednesday, January 17, 1906, at 12 o'clock noon.

"The Secretary read the report of the Nominating Committee as follows:

"To the Board of Trustees of the American Surety Company of New York:

GENTLEMEN: The Committee appointed by the Executive Committee of this Company at their meeting held Wednesday, December 13, 1905, for the purpose of nominating officers of the Company, * * * for the ensuing year, beg leave to report as follows:

104 "We nominate for Resident Vice Presidents at Hutchinson, Kansas: Howard S. Lewis, A. W. Eagan.

Resident Assistant Secretaries at Hutchinson, Kansas: Louis E. Fontron, Howard S. Lewis.

"Whereupon, it was

"*Resolved*, That the Secretary be authorized to cast one ballot on behalf of the Trustees present for the officers, members of the Executive Committee, and for the members of the Committee on Accounts, as recommended by the Nominating Committee for the ensuing year; which was done, and thereupon the aforementioned persons were declared to have been unanimously elected to their respective offices for the ensuing year.

"The following resolution was adopted:

"*Resolved*, That the Resident Vice-Presidents be and they hereby are, and each of them is hereby authorized and empowered to execute and to deliver and to attach the seal of the Company to any and all obligations for or on behalf of the Company, such obligations, however, to be attested in every instance by the Resident Assistant Secretary."

STATE OF NEW YORK, *County of New York, ss:*

I, F. B. Holdridge, Assistant Secretary of the American Surety Company of New York, do hereby certify that I have compared the foregoing extracts and transcripts, from the Record Book of the Board of Trustees of the American Surety Company of New York, with the original record of said Board, and that the same are

105 correct extracts and transcripts therefrom as they appear of record and are set forth and contained in said Record Book; and I further certify that I have compared the foregoing resolutions with the originals thereof, as recorded in the Minute Book of said Company, and do certify that the same is a correct and true transcript therefrom, and of the whole of said original resolutions; and that the said resolutions have not been revoked or rescinded.

Given under my hand and the seal of the Company, at the City of New York, this 25th day of January, 1906.

[SEAL.] F. B. HOLDRIDGE,
Assistant Secretary.

Endorsed: 1101, in equity. Supersedeas bond. Supersedeas Bond, Water Light & Gas Co. *vs.* City of Hutchinson, Kans. Filed M'ch 15, 1906. Geo. F. Sharitt, Clerk. By J. F. Shearman, D. C.

106 In the Circuit Court of the United States, District of Kansas, Second Division.

THE WATER, LIGHT & GAS CO., Complainant,

vs.

J. P. HARSHA, Mayor; J. E. HOSTUTLER, L. A. BEEBE, M. I. HULTS, C. W. OSWALD, F. G. DELANO, JOHN BLAIR, W. E. LONG, W. S. THOMPSON, C. HOWARD, F. M. MCDERMED, C. O'NEAL, C. I. PARKS, Councilmen, and S. F. JOHNSON, City Clerk, EMERSON CAREY, K. E. SENTNEY, C. M. WILLIAMS, C. H. MCBURNEY, A. W. SMITH, and J. S. GEORGE, Defendants.

Order Allowing Appeal.

On petition of complainant in open court with due notice to defendants in the presence of their Counsel, it is ordered that an appeal to the Supreme Court of the United States be allowed Complainant from the orders and decrees in said cause made March 15th, 1906, and entered herein, and that a certified transcript of the record, exhibits, stipulations and all proceedings herein be forthwith transmitted to the Supreme Court of the United States.

It is further — that the bond on appeal be fixed at $500.00 and that the same act as a supersedeas bond, and also as a bond for costs and damages on appeal.

Dated March —, 1906.

JOHN C. POLLOCK,
Circuit Judge.

Endorsed: 1101. In Equity. Order allowing appeal. Filed M'ch 15, 1906. Geo. F. Sharitt, Clerk, By J. E. Shearman, D. C.

107 UNITED STATES OF AMERICA,
District of Kansas, Second Division, ss:

I, Geo. F. Sharitt, Clerk of the Circuit Court of the United States of America, for the District of Kansas, do hereby certify that the foregoing transcript contains full, true and complete copies of all the pleadings, proceedings, writs, records and record entries, in a certain cause in the Second Division of said Court, wherein The Water, Light & Gas Company, a Corporation, is complainant, and J. P. Harsha, Mayor, and others are defendants, as full, true and complete as the originals of the same now remain on file and of record in my office.

I further certify that the original Citation in said cause is hereto attached and herewith returned.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court, at my office in Wichita, in said District and Division, this 7th day of June, A. D. 1906.

[Seal of the Circuit Court of the United States, Second Division, District of Kansas, 1890.]

GEO. F. SHARITT, *Clerk,*
By J. F. SHEARMAN,
Deputy Clerk.

Endorsed on cover: File No. 20,288. Kansas C. C. U. S. Term No. 53. The Water, Light & Gas Company of Hutchinson, Kansas, appellant, *vs.* The City of Hutchinson *et al.* Filed June 18th, 1906. File No. 20,288.

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1907.

No. 54.

THE WATER, LIGHT & GAS COMPANY OF HUTCHINSON, KANSAS, APPELLANT,

vs.

THE CITY OF HUTCHINSON ET AL.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KANSAS.

FILED JUNE 18, 1908.

(20,289.)

(20,289.)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1907.

No. 54.

THE WATER, LIGHT & GAS COMPANY OF HUTCHINSON, KANSAS, APPELLANT,

vs.

THE CITY OF HUTCHINSON ET AL.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KANSAS.

INDEX.

	Original.	Print.
Citation and acceptance of service	1	1
Bill of complaint	2	2
Ordinance No. 661	17	12
Ordinance No. 402	21	15
Precipe for chancery subpœna	34	22
Chancery subpœna	35	23
United States marshal's return thereon	36	24
Bond for costs	38	24
Demurrer to bill	39	25
Application for leave to file a supplemental bill	41	26
Notice of application to file a supplemental bill	44	28
Motion for temporary order of injunction	45	29
Notice of motion for temporary injunction	47	30
Supplemental bill	49	31
Proposition to city council	51	33
Acceptance by city	53	33

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JUNE 27, 1907.

	Original.	Print.
Affidavit of H. Whiteside	54	34
Decree	59	37
Copy of opinion in case No. 1101	62	38
Copy of decree in case No. 1101	75	50
Assignment of errors	78	51
Appeal bond	80	52
Petition for appeal	82	53
Order allowing appeal	83	54
Clerk's certificate	84	54

1 #1108.

UNITED STATES OF AMERICA, *ss:*

To the defendants, The City of Hutchinson, J. P. Harsha, Mayor, J. E. Hostutler, L. A. Beebe, M. I. Hults, C. W. Oswald, F. G. Delano, John Blair, W. E. Long, W. S. Thompson, C. Howard, F. M. McDermed, C. O'Neal, and C. I. Parks, S. F. Johnson, City Clerk, and The People's Water, Light & Power Company.

You are hereby cited and admonished to be and appear at the Supreme Court of the United States to be holden at Washington on the 2nd day of October, 1906, pursuant to an appeal filed in the Clerk's office of the Circuit Court of the United States, District of Kansas, Second Division, wherein The Water, Light & Gas Company of Hutchinson, Kansas, is appellant and the City of Hutchinson, J. P. Harsha Mayor, J. E. Hostutler, L. A. Beebe, M. I. Hults, C. W. Oswald, F. G. Delano, John Blair, W. E. Long, W. S. Thompson, C. Howard, F. M. McDermed, C. O'Neal and C. I. Parks, S. F. Johnson, City Clerk, and the People's Water, Light & Power Company are respondents, to show cause, if any there be, why the judgments in said appeal mentioned should not be corrected, and speedy justice should not be done to the parties on that behalf.

Witness, the Hon. Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 11th day of April, in the year of our Lord, nineteen hundred and six.

JOHN C. POLLOCK,
Circuit Judge.

The Def'ts accept service of this citation & enter their appearance in the said cause.

A. C. MALLOY, AND
PRIGG & WILLIAMS,
Attorneys in Fact and of Record for Def'ts.

[Endorsed:] #1108 In the Circuit Ct. U. S. The Water Light & Gas Co. *vs.* The City of Hutchinson *et al.* Citation & acknowledgment of service & Entry of appearance. Filed May 7 1906 Geo. F. Sharitt, Clerk, By J. F. Shearman, D. C.

2 In the Circuit Court of the United States for the District of Kansas, Second Division.

THE WATER LIGHT & GAS COMPANY, a Corporation, Complainant,
vs.
THE CITY OF HUTCHINSON, J. P. HARSHA, Mayor, J. E. HOSTUTLER, L. A. BEEBE, M. I. HULTS, G. F. OSWALD, F. F. DELANO, JOHN BLAIR, W. E. LONG, W. S. THOMPSON, C. HOWARD, F. M. McDERMED, C. O'NEAL, and C. I. PARKS, Councilmen, and S. F. JOHNSON, City Clerk of said City, THE PEOPLE'S WATER, LIGHT & POWER CO. OF HUTCHINSON, Ks., a Corporation, Defendants.

Bill of Complaint.

To the Honorable the Judges of the Court aforesaid:

Your Orator, the Water, Light & Gas Company, files this, its bill of complaint against the above named defendants, and therein complains and alleges:—

First. That complainant is a corporation organized and existing under and by virtue of the laws of the State of New Jersey for the purpose of furnishing the public utilities and services of water, light, heat and power, and is a citizen of said State of New Jersey, and has been duly authorized by the State of Kansas, through the Charter Board of said State, to do business in said State of Kansas, and particularly in the city of Hutchinson in said State; that said city of Hutchinson is a municipal corporation, a city of the second class, organized and existing as such under the laws of the State of Kansas; that J. P. Harsha is Mayor, and J. E. Hostutler, L. A. Beebe, M. I. Hults, C. W. Oswald, F. G. Delano, John Blair, W. E. Long, W. S. Thompson, C. Howard, F. H. McDermed, C. O'Neal and C. I. Parks are Councilmen of said city; that S. F. Johnson is City Clerk of said city; that all of said officers of said city are citizens of the State of Kansas and residing in said city; that the People's Water,
3 Light & Power Co., a corporation organized under the laws of the State of Kansas are citizens of said State of Kansas and residing in said city.

Second. In the year 1885 the city of Hutchinson, by its duly enacted and published ordinance No. 199, granted to the Holly Manufacturing Company, a corporation organized and existing under the laws of the State of New York, its successors and assigns, a franchise and contract, right to build and operate a waterworks in said city and extend pipes and mains through its streets, alleys and public places for the purpose of supplying the said city and the inhabitants thereof with water; that said grant contained in said ordinance gave to said Holly Manufacturing Company, its successors and assigns, the exclusive right for the term of twenty years from and after its taking effect, to maintain its said pipes and mains in the streets, alleys and public places of said city, and to supply said city and its inhabitants with water. Said Holly Manufacturing Company, in

and by its acceptance of the terms and provisions of said ordinance, contracted for itself, its successors and assigns, that it or they would rent to said city the use of certain of its hydrants or would furnish water to said city for the extinguishment of fires at the sum of $80.00 per hydrant per annum up to the number of seventy-five hydrants, and at the sum of $60.00 per hydrant per annum for all hydrants above said number of seventy-five and said city contracted and agreed to pay said sums of money as and for said hydrant rental. Said Holly Manufacturing Company, and its successors and assigns hereafter named, in reliance on said ordinance and franchise and contract rights granted therein, erected waterworks in said city and placed therein valuable machinery for their operation and extended mains and pipes through the streets and public places of said city, put in hydrants as required, and in pursuance to its and their obligations furnished to the city and its inhabitants water at the prices fixed in said ordinance, and made valuable and extensive betterments and improvements of the waterworks from time to time for the purpose of furnishing good water service to said city.

4 Third. In the year 1885 the said city of Hutchinson by ordinance No. 198 granted to the Inter-State Gas Company, a corporation organized under the laws of the State of Missouri but doing business and authorized to do business in the State of Kansas, its successors and assigns, a franchise and contract right to erect and maintain a plant for the manufacture and furnishing of gas and to extend and maintain gas-mains in connection therewith throughout said city and its streets and public places for the purpose of furnishing said city and the inhabitants thereof with gas, light, heat and power, which said franchise and contract was for the period of twenty-one years from the taking effect of said ordinance. In reliance on said franchise and contract said Inter-State Gas Company, and its successors and assigns hereafter named, erected a large and valuable gas plant in said city and extended its mains and pipes throughout the streets and other public places of said city and in pursuance to its and their obligations furnished said city and its inhabitants with gas for light and heat.

Fourth. In the year 1886 the said city of Hutchinson by ordinance No. 3 granted to one J. S. Drake and one C. M. Orton, citizens of the states of New York and Illinois, respectively, and partners under the firm name of Drake & Orton, their successors and assigns, a franchise to construct and operate an electric light plant in said city for the purpose of furnishing said city and the inhabitants thereof with electric light for lighting, heating and other purposes, with the right to erect poles, and extend wires and other appliances along, through and across the streets, alleys and other public places in said city. Said franchise and contract was for the period of twenty years from the taking effect of said ordinance. Said Drake & Orton, and their successors and assigns hereafter named, in reliance upon said franchise and contract, erected an electric light plant in said city, placed therein valuable machinery for its operation, and erected poles, and extended wires thereon throughout the city, and

in pursuance to their obligations, furnished electric light, heat and power to said city and its inhabitants.

5 Fifth. On the 7″ day of May, 1886, the aforenamed Holly Manufacturing Company, by and with the knowledge and consent of said city of Hutchinson, sold and assigned to the Hutchinson Water, Light & Telephone Company, a corporation organized under the laws of the State of Kansas, its successors and assigns, and the said Hutchinson Water, Light & Telephone Company purchased from said Holly Manufacturing Company, all the property, franchises and contracts belonging to said last named Company in said city of Hutchinson, and became the owner thereof and the successor and assignee of said Holly Manufacturing Company. And on the 1″ day of May, 1886, the aforenamed Drake & Orton, with the knowledge and consent of said city of Hutchinson, sold to said Hutchinson Water, Light & Telephone Company, its successors and assigns, and the said Hutchinson Water, Light & Telephone Company purchased from said Drake & Orton all the property, Franchises and contracts belonging to said Drake & Orton in said city, and became the owner thereof and the successor and assignee of said Drake & Orton. And on the 20″ day of March, 1886, the aforenamed Inter-State Gas Company sold to the Hutchinson Gas Light & Fuel Company, a corporation organized and existing under the laws of the State of Kansas, and its successors and assigns, and the said Hutchinson Gas, Light & Fuel Company purchased from said Inter-State Gas Company, all its property, franchises and contracts with said city, and became the owner thereof and the successor and assignee of said Inter-State Gas Company.

On the 30″ day of November, 1889, the corporate name of said Hutchinson Water, Light & Telephone Company was duly changed to that of the Hutchinson Water, Light & Power Company.

On the 20″ day of May, 1890, the aforenamed Hutchinson Gas, Light & Fuel Company, by and with the knowledge and consent of said city of Hutchinson, sold to the aforesaid Hutchinson Water, Light & Power Company, its successors and assigns, and the said Hutchinson Water, Light & Power Company purchased from said Hutchinson Gas, Light & Fuel Company, all the property, franchises and contracts belonging to said last named company in said city of Hutchinson, and became the owner thereof and the successor

6 and assignee of said Hutchinson Gas, Light & Fuel Company, among which said franchises and contracts was one that had been secured to said Hutchinson Gas, Light & Fuel Company, its successors and assigns, by ordinance of said city No. 206, by the terms of which said ordinance said city agreed with said Hutchinson Gas, Light & Fuel Company, its successors and assigns, to take from it and use one hundred and twenty-five gas lights and to pay for the same at the rate of $25.00 per light per annum for the term of ten years commencing on the 1″ day of June, 1890.

Sixth. After the purchase by and assignment to the aforesaid Hutchinson Water, Light & Telephone Company of the aforesaid water, gas, light, heat and power franchises and contracts, it and the aforesaid Hutchinson Water, Light & Power Company, to which

its name had been changed, and the aforesaid Hutchinson Gas, Light & Fuel Company and its successor and assignee, from time to time, as the public requirements justified and as the mayor and councilmen of said city ordered and directed, made large investments and expenditures for the purpose of bettering and improving its plant and property, and for the extension of the service it had obligated itself to render said city and the inhabitants thereof, and in order to enable it to do so borrowed from time to time large sums of money until in or about the year 1890 the said sums so borrowed aggregated $400,000, which said money was expended by it for the purposes procured, to-wit, the betterment, improvement, enlargement and extension of the several water, light, gas, heat and power properties and services. To secure the said sum of $400,000, it, the said Water, Light & Power Company, executed a mortgage on all the aforesaid properties, including the aforesaid franchises and contract rights, and including the income from said city of Hutchinson which it was obligated to pay for the water, light and gas services so as aforesaid furnished to it.

Seventh. In the year 1897 the said city of Hutchinson became indebted to the said Hutchinson Water, Light & Power Company for hydrant rental in the sum of $12,800 in excess of its ability to pay,
and then and there defaulted in the payment of said sum due
7 to said Water, Light & Power Company. Before the year 1897 said city of Hutchinson had defaulted at various times in the payment of the sums due from it to said company for the several services furnished and performed for it by said company, so that the said company for several years preceding the year 1897 became, on account of said defaults, greatly embarrassed and hindered in the payment of interest due on its aforesaid mortgage indebtedness, and in the prosecution of its work of furnishing the services of water, light, heat and power to said city and its inhabitants, and in the year 1896, on account of the default of said city, and the hindrances and embarrassments caused to said company thereby, the holders of the aforesaid mortgage bonds of said company took possession of said various properties, franchises, contracts and public services and operated the same by and for themselves during said year 1896 and a portion of the year 1897 until the readjustment of the indebtedness due to said Water, Light & Power Company, and until the granting of the new franchise and contract next hereinafter mentioned were effected.

Eighth. Because of the embarrassed condition of said Water, Light & Power Company so as aforesaid caused by the delinquencies and defaults of said city of Hutchinson, it became expedient to reduce or scale down the bonded indebtedness of said company to its aforesaid mortgage creditors, and to procure from said city of Hutchinson, for the benefit of said company and its mortgage creditors, a new franchise and contract for the furnishing of the aforenamed public services to said city and its inhabitants, and therefore it was agreed by said company and the holders of its said mortgage indebtedness that in the event of and in consideration of said company securing a renewal and extension of its aforesaid franchises and con-

tracts with said city and a readjustment of the contract obligations between said company and said city they, the said mortgage bondholders, would reduce or scale down their mortgage indebtedness from the aforesaid sum of $400,000 to the sum of $212,500.

On March 5", 1897, the said Water, Light & Power Company, at the special instance and request, and on the earnest and re-
8 peated solicitations of the said city of Hutchinson theretofore often made, and upon the representation of said city of its inability to pay all of the indebtedness then due from it to said company and to meet and discharge the current indebtedness thereafter to become due from it under the existing franchise and contract, agreed with said city to remit one-half of the indebtedness then due to it from said city and to consent to a reduction of the theretofore agreed prices for water and electric light to be thereafter furnished and to give to said city various other benefits and advantages presently hereafter to be named, including a surrender of all existing franchises and contracts, if the said city on its part would regrant and extend and renew the term of the aforesaid franchise and contracts and would make said franchises and contracts in respect of light, heat and power to be furnished said city and its inhabitants exclusive to said company for said term as the said water franchise and contract was already exclusive. Thereupon the said Water, Light & Power Company and the said city, in consideration of all the premises aforesaid, mutually made the concessions and readjustments now mentioned, to-wit, The said company on its part agreed to remit and did remit to said city the sum of $6,400 then due from said city, being one-half of the total sum then due and in default from said city, and agreed to reduce and did reduce the annual sum to be paid for hydrant rental from $12,800 to $6,000 for the remaining years covered by the franchise and contract held by said city, to-wit, for eight years and seven months, for the one hundred and eighty-five hydrants then located on the different mains in said city, and further agreed to reduce the rate of hydrant rental per annum from $60.00 to $36.00 per hydrant for all hydrants thereafter to be located on extension of water mains ordered and directed to be made by said city, and to reduce the number of hydrants on extensions of water mains thereafter ordered and directed to be made by said city from twelve per mile, as specified in the previous franchises and contracts, to ten per mile under the new franchise and contract to be made.

None of the aforementioned franchises and contracts made
9 with said city provided for any right in said city to purchase or otherwise acquire said properties or to terminate the aforesaid franchises and contracts at earlier dates than the dates in said ordinance grants specified. Wherefore the said company on its part, in consideration of the premises aforesaid, agreed to and with said city that at the end of ten years thereafter, or at any time after the expiration of ten years, said city should have the right and privilege of acquiring the ownership and possession of all of said property, and the termination of all of said franchises and contracts on the payment of compensation therefor to be mutually agreed on or to

be fixed by a court of competent jurisdiction. Thereupon said city, having solicited said Water, Light & Power Company to make the aforesaid concessions, and having procured the same to be made in consideration thereof, on its part consented to a regrant or renewal and extension of the aforesaid franchises and contracts, embodying all and singular the aforesaid concessions and considerations, and to evidence and secure the same it, the said city, by a certain ordinance No. 402, approved March 5″, 1897, and published in a newspaper and taking effect March 17″, 1897, granted to said company, its successors and assigns, for the period of twenty years from said date the exclusive right and privilege of supplying said city and its inhabitants with the public utilities of water, and of light, heat and power by means of electric current and gas, a copy of which said ordinance is hereto attached and made a part of this bill.

In and by the terms and conditions of said ordinance, and as one of the concessions made by said Water, Light & Power Company for itself, its successors and assigns, it was agreed that said franchise for furnishing electric current or power should not be exclusive as to or for the operation of street railways in said city, nor should it be exclusive as to any person residing in said city nor any company doing business therein as to prevent said persons or companies from manufacturing gas, electricity or other material for his or their own use for light or fuel, but as to all other persons and companies, and as to all other purposes the said franchise, contracts and grant contained in said ordinance gave to said company, its successors and assigns, for the period named, exclusive rights and privileges.

Said concessions by said company and said abatements of indebtedness by it would not have been made by it save and except in return and for the consideration of the aforesaid exclusive rights and privileges so as aforesaid granted and conferred.

The total abatements and reductions of monetary demands made by said company for the considerations aforementioned were the sum of $6,400 of past due indebtedness, and the sum of $6,800 per annum of indebtedness secured by contract for future water services, to-wit, for the period of eight years and seven months which said water franchise had yet to run, in all the sum of $58,840 for said future services, being a total of $65,240 which said company remitted from its contract rights and demands against said city.

Thereafter in the year 1898 the mortgage bondholders of said Water, Light & Power Company, who also had become the owners of the stock of said company at great expense to themselves, in consideration of their promise and agreement so as aforesaid made with said company and for the purpose of effectuating the promises and agreements between said company and said city contained in said ordinance No. 402, scaled down and reduced their said indebtedness from the sum of $400,000 to $212,500 and canceled and released their said mortgage of $400,000, and in lieu thereof agreed to substitute and did substitute a mortgage on the property, franchises and contracts of said company and on the income from its performance of the aforesaid public services in the sum of only $212,500.

Said mortgage in said sum still subsists on said property, franchises, contract and income and remains due and unpaid and has yet remaining more than twenty years to run.

Ninth. The said Hutchinson Water, Light & Power Company remained in the possession of the aforesaid franchise and contract rights from the 5″ day of March, 1897, until the 4″ day of October, 1902, when it sold and transferred to your Orator all of its property, contracts and franchises and by deed of said date conveyed
11 the same to your Orator, and your Orator since said date has been in the possession and enjoyment of the same and in the fulfillment of all the duties and obligations imposed on it by virtue of its said purchase and said ordinance liabilities. Said sale and conveyance to your Orator, and said assumption and discharge of said ordinance obligations were all made with the knowledge and consent of said city of Hutchinson and the said city has ratified and approved the same and contracted and dealt with your Orator as the rightful successor and grantee of said Hutchinson Water, Light & Power Company.

Tenth. Since the purchase of said water, light and power property, and in the discharge of the obligations resting upon it your Orator, as the successor of said Hutchinson Water, Light & Power Company, has expended large sums of money in the betterment, improvement and extension of its several public services and in particular has at divers times, under the order and direction of said city, placed a large number of hydrants on extensions of water mains over and in addition to the original number of one hundred and eighty-five hydrants in said city at the time of the passage of said ordinance No. 402, March 5″, 1897, which said additional hydrants, as agreed upon as aforesaid, were in the number of ten per mile instead of twelve per mile as agreed upon between said city and said Water, Light & Power Company prior to the passage of said ordinance No. 402; and your Orator since its acquisition of said property, franchises and contracts, and in obedience to the order and direction of said city, and at large expense to itself, but without any obligation to do so, has taken up about two miles of water main which had been theretofore by order of said city located at disadvantageous and unnecessary places where they were useless for the purposes of said city and its inhabitants, and has removed and relocated the same at large expense to itself to places of utility and advantage to said city and its inhabitants whereby said city was saved large sums of hydrant rentals for said hydrants at said disadvantageous and useless locations.

And your Orator further says that among other things, in obedience to the request of said city, but without any obligation
12 so to do, it changed a large number of its all-night lamps to half-night lamps, whereby it surrendered to said city its claim and demand for the cost of all-night service to the lower cost of half-night service. Your Orator says that all of the aforementioned betterments and improvements and expenditures of money and concessions to said city were made by it in reliance on the obligation of said city and its good faith in carrying out all the terms

and conditions and provisions of said ordinance contract No. 402, and would not have been made or done except for its reliance on said obligation and good faith of said city; nor would it have made its purchase of said property, franchise and contracts as hereinbefore stated except for its reliance on the obligation and good faith of said city in carrying out the terms and provisions of said ordinance contract.

Eleventh. Your Orator says that from and since its aforesaid purchase of said property, franchises and contracts it has fully and in good faith observed all the terms and conditions of said ordinance contract No. 402, and all the terms and conditions of all dependent contracts made and executed between it and said city in regard to the furnishing of all the aforesaid public services; that it has furnished an adequate supply of good, wholesome water to said city and to the inhabitants thereof, and an adequate and efficient electric light and electric power service fully up to the required standard to said city and its inhabitants, and has furnished to the inhabitants of said city a good quality of manufactured gas, and in all respects has rendered efficient and adequate services to said city at the rates prescribed by said ordinance contract No. 402, and in many particulars and instances at rates for below those which by said ordinance it was permitted to charge, and wherein said ordinance did not prescribe rates for services furnished it has furnished said services at fair and reasonable rates, and since its acquisition of said property has largely reduced the rates for said services below the rates charged by its predecessor, the aforesaid Hutchinson Water, Light & Power Company.

13 Twelfth. Your Orator further avers that notwithstanding the premises aforesaid, and in particular regardless of the aforesaid ordinance contract by which the exclusive right to furnish the aforesaid public services to said city and its inhabitants was secured to the aforesaid Water, Light & Power Company and your Orator as its successor and grantee, the said city, by and through its mayor and councilmen heretofore named, and on or about the 23" day of February, 1906, enacted and published an ordinance No. 661 by and in accordance with the terms of which, and in particular by the terms of the various sections thereof, it assumed to grant to the aforenamed People's Water Light & Power Co. the right and privilege for the term of twenty years thereafter of establishing and operating in said city a plant and appliances for the manufacture and sale to said city and its inhabitants of electric light and power and manufactured and natural gas, with the right and privilege to lay and construct gas mains and pipes and erect poles and wires and all other things necessary to the maintenance of said public services in the streets, alleys and public places of said city and also to erect and maintain water works and water mains in *in* said *said* and to furnish said city and its inhabitants water and in opposition to the like business of your Orator in said city, a copy of which said ordinance No. 661 is hereto attached and made a part of this bill of complaint, and it, the said grantee of said assumed and pretended ordinance franchise right, threatens and gives out that it will immediately proceed

to the erection of their said public service plants and properties and the utilization of said pretended franchise and contract rights so assumed to have been granted to them.

Thirteenth. Your Orator says that the aforementioned ordinance No. 402 was enacted by the councilmen of said city and approved by the mayor of said city in pursuance of authority to enact the same duly conferred on said mayor and council by the public statutes of the State of Kansas and was accepted by said company and by your Orator as its successor and grantee, and the same constitutes in respect of all the rights secured to your Orator, and in particular in respect of the exclusive rights and privileges thereby conferred, and contract between said city and your Orator which the action of said mayor and council of said city by and through said ordinance No. 661 illegally and inequitably impairs, wherefore your Orator says that said action of said mayor and council is in violation of that provision of the Constitution of the United States which forbids the impairment of the obligation of contracts by the several States of the Union.

Fourteenth. Your Orator further says that notwithstanding the making, as aforesaid alleged, of all the large monetary abatements of past due indebtedness, and concessions and reductions of contract price, and the other large and valuable considerations paid or secured to said city in consideration of its enactment of said ordinance No. 402, neither it, the said city, nor the grantee or beneficiaries named in said ordinance No. 661 have paid or tendered to your Orator a return of any of said sums of money or have in anywise offered to make your Orator whole in respect thereto or to secure your Orator against loss from the competition of said proposed rival public service association or company.

Fifteenth. Your Orator says that the time said public service enterprises were undertaken by the several aforenamed companies and down to and including the acquisition of said public service franchises and properties and contracts of your Orator the city of Hutchinson was small in population, at the first of said time not more than five thousand and at the last of said time not more than ten thousand in number; that it would have been impossible at either of said times, through lack of sufficient patronage, to have maintained rival or competing public service companies in said city, and it is impossible now, through lack of sufficient patronage, to maintain two said companies in said city in competition with each other and enable either of them to earn a fair and reasonable income on the cost of their respective properties, and at the times aforesaid mentioned no association or individual would have undertaken the establishment and maintenance in said city of said public services without being secured in the enjoyment thereof for a reasonable time as against the competition of rival companies by exclusive grants or privileges for a time sufficient to enable them to have secured a return of the capital invested with reasonable interest or income thereon for the time being, nor could the large sums of money necessary to enable the establishment and building and maintenance of said public services have been secured save and

except under and in pursuance to ordinance contracts conferring such exclusive rights as would enable the borrowing of said money and to make assured repayment of the same with reasonable interest thereon: And your Orator says that it has not up to this time and will not for many years yet to come have secured the repayment of the purchase price of said public services and the cost of the various betterments, improvements and extensions of the same which have been made.

Sixteenth. Your Orator avers that it does not seek to prevent the granting of the franchise contained in said ordinance No. 661 for the erection and maintenance of an electric light or power plant for the operation of a street railway in said city or elsewhere, but your Orator says that the establishment and maintenance of said public service so assumed to be authorized by said ordinance No. 661 for any other purpose than the operation of an electric railway would be a violation of your Orator's rights and would cause your Orator great and irreparable damage: And your Orator says that the amount of said damage and the value or amount of the matter in dispute in this action exclusive of costs of said action are far in excess of the sum of $2,000.

Wherefore, your Orator prays, that a subpœna do issue and be served upon all defendants named herein and in the above caption, commanding them to make answer hereto; that a writ of injunction be issued commanding the defendants and all persons claiming to act under their authority and direction to refrain and desist from doing any acts or exercising any pretenses of right to act under the aforesaid ordinance No. 661 granted to defendants as aforesaid which will in anywise affect the exclusive rights of your Orator to furnish the said city and its inhabitants with electric or gas light for
16 lighting and heating purposes or power except for street cars and electric railways, and also from making or proceeding to make any contract for furnishing light or gas to said city and its inhabitants until the expiration of the aforesaid franchises and contracts of your Orator with said city and from doing any thing to impair the contracts of complainant with said city.

And your Orator also prays for such other and further relief as may be equitable and just, and particularly that a temporary order of restraint or injunction issue against said defendants until the final termination of this suit, and that thereupon the said temporary injunction be made perpetual.

H. WHITESIDE,
FAIRCHILD & LEWIS AND
FRANK DOSTER,
Solicitors for Complainant.

UNITED STATES OF AMERICA,
District of Kansas, ss:

W. E. Hutchinson being duly sworn on oath says, that he is the President and General Manager of the Water, Light & Gas Company, the complainant in the foregoing amended bill of complaint, and

that he is duly authorized to verify the allegations of the foregoing amended bill of complaint; that said complainant is a corporation and a non-resident of the State of Kansas; that affiant is familiar with all the facts stated in the said foregoing amended bill of complaint, and, that all the matters and things therein stated are true in substance and in fact.

W. E. HUTCHINSON. [SEAL.]

Subscribed and sworn to before me this 10″ day of March, 1906.

S. F. HUTTON,
Notary Public.

Mar. 10, 1906.

My Commission expires Oct. 20, 1907.

17 (First Publication Feb. 23, 1906.)

Ordinance No. 661.

An ordinance giving and granting to The People's Water, Light & Power Company of Hutchinson, Kas., its successors and assigns, right and authority, subject to certain restrictions, to furnish electric light and power and gas (natural or artificial) for light, heat and fuel to the city of Hutchinson and the inhabitants thereof for the term of twenty years.

Be it ordained by the Mayor and Councilmen of the City of Hutchinson:

SEC. 1. That there is hereby given and granted, subject to certain conditions and restrictions hereinafter set forth, to The People's Water, Light & Power Company, its successors and assigns, of Hutchinson, Kas., the right, permission and authority for the term of twenty years from and after the date of the publication of this ordinance to furnish the City of Hutchinson, and the inhabitants thereof, with electric current for light and power, and for all other purposes for which electric current is used, and with gas either natural or artificial, for light, heat and fuel. And for the purpose of carrying into effect the powers herein granted, the said The People's Water, Light & Power Company, its successors and assigns, is hereby authorized to erect poles and wires in the streets avenues, alleys and public grounds in said city of Hutchinson, and to cross any stream or bridge in said city, and to erect and maintain all engines, machinery and other appliances necessary to carry into effect the powers herein granted; also to use the streets, avenues, alleys and public grounds of said city for the purpose of laying pipes, mains and conduits to distribute gas to the city and the inhabitants thereof; Provided, however, that the placing of poles, wires and other appliances for the carrying of electric current, and the placing and laying of mains, pipes and conduits for the distribution of gas, in the streets, avenues, alleys and public grounds of said city, shall be subject to

the control and direction of the council of said city; it being
18 the intention hereof to enable the council to designate whether, at certain places, which the council may select, the poles, wires, mains, pipes and other appliances of said company shall be placed in the street or the alley, and at what points in said streets or alleys; but if said council shall not, at any time when requested by said company, designate said locations hereinbefore referred to, then said company, its successors and assigns, shall be entitled to locations in said streets, avenues, alleys and public grounds of their own choosing.

SEC. 2. The said The People's Water, Light & Power Company, its successors and assigns, shall not at any time so construct any of their poles, wires, mains, pipes or other appliances in such a manner as to hinder or obstruct the trade or commerce of said city, nor to obstruct the proper use of the streets, avenues, alleys or public grounds of said city except as may be necessary temporarily to make repairs, extensions or improvements to its work.

SEC. 3. That the excavations, or other disturbance to any street, avenue, alley or public place in said city, made by said company, its successors and assigns, in the prosecution of its business, shall be suitably and carefully guarded and protected, and said excavation or other injury shall be without delay properly remedied so as to leave the street or other public place in as good condition as before.

SEC. 4. It is stipulated and agreed that as a condition precedent to the vesting of the rights and privileges conferred by this ordinance and franchise, the said The People's Water, Light & Power Company shall file with the clerk of the City of Hutchinson its written acceptance of this franchise, and of all its terms and conditions, within thirty days from the date of the passage and approval hereof. And it is further stipulated and agreed that the grantee herein, its successors and assigns, shall be bound by a maximum rate, as hereinafter set forth. At no time shall the charge for electric current furnished by the grantee herein, its successors and assigns, exceed the sum of 12 cts. per 1,000 watts for the amount used each month. And at no time shall the charge for artificial gas furnished by the
19 grantee herein, its successors and assigns, to the city and its inhabitants, exceed the following rates:

For lighting purposes, $1.75 per 1,000 feet.

For heat or fuel, $1.25 per 1,000 feet.

Where both light and fuel are used by the same consumer, the consumer shall be entitled to the fuel rate on both.

In case natural gas be used at any time, the rate shall not exceed 40 cents per 1,000 feet for light or fuel. Provided, that nothing contained in this section shall be construed to prevent grantees, its successors and assigns, from charging a mimimum rate of $1.00 per month for electric current, and 25 cents per month for artificial gas, and 25 cents per month for natural gas.

SEC. 5. The said The People's Water, Light & Power Company, its successors and assigns, shall, in the conduct of its business, use standard and accurate meters, and keep the same in good repair and condition, so that they shall accurately record the amounts of elec-

tric current or gas used by the consumer; and the City of Hutchinson hereby reserves the right to inspect said meters at any time upon the filing with the clerk of said city of written complaints from consumers as to the accuracy of said meters: Provided, said inspection shall be made by a competent person, and in case the meter be found to be incorrect, it shall be immediately remedied and made correct by said company, and the expense of said inspection shall be borne by said company in case the consumer shall have first requested said company in writing to correct said meter, and said company shall have failed to do so for fifteen days; otherwise, and in case said meter be found to be correct, said expense shall be borne by the consumer making said complaint.

SEC. 6. Said grantee, its successors and assigns, shall hold the City of Hutchinson harmless from all damages, costs, charges or liens arising from the negligence of grantee, its successors and assigns, or any of its servants or employees in the course of their employment, in the construction, operation or repairs of its poles, wires, mains, pipes and other appliances, or in its business generally.

20 SEC. 7. Said grantee, its successors and assigns, shall commence the construction of an electric plant to carry out the powers hereinbefore granted within three months from the date of the publication of this ordinance, and shall have same completed and in operation within one year from said date; and if said construction be not so commenced within said time, and be not so completed and in operation within one year, then this franchise, and all rights and privileges thereunder shall revert to the said City of Hutchinson without further action or notice, and this ordinance shall become inoperative and void. And said grantee, its successors and assigns, shall complete and have in operation within five years from the date of the publication of this ordinance a system of gas mains, actually furnishing to the city and its inhabitants either natural or artificial gas; and if said system of mains be not so completed and in operation within said five years, then so much of this ordinance as relates to the right of grantee, its successors and assigns, to furnish gas to the city and its inhabitants, shall, without further action or notice, become inoperative and void, and all rights thereunder shall revert to said City of Hutchinson. Provided, that delays by litigation or unavoidable accident shall not be counted against said company in constructing said electric plant.

SEC. 8. The City of Hutchinson hereby agrees that it will pass all necessary ordinances for the protection of the property of the said grantee herein, its successors and assigns, and to prevent improper and useless interference with its poles, wires, machinery, mains, pipes and other appliances.

SEC. 9. This ordinance shall take effect and be in force from and after its publication once in The Hutchinson News.

[SEAL.] J. P. HARSHA, *Mayor.*

Approved, Feb. 21, 1906.
Attest: S. F. JOHNSON, *City Clerk.*

21 *Ordinance No. 402.*

An ordinance to provide for a system of water works, electric light works and gas works, and supply of water, electric current and gas to the city of Hutchinson, and the inhabitants thereof.

Whereas, The Hutchinson Water, Light and Power Company is the owner of certain exclusive franchises and contracts with the city of Hutchinson, under which and in accordance with which the said company has expended large sums of money in constructing and building water works, electric light works and gas works, and in building up the business of said works, which are now in successful operation in supplying the city of Hutchison and the inhabitants thereof with water, electric current and gas for all purposes for which water, electric current and gas is used; and

Whereas, The city of Hutchinson is desirous of modifying and changing said franchise and contracts to the advantage of said city of Hutchinson without cancelling or abridging any of the rights or privileges vested in said company by reason of its labor and investments under said franchises and contracts other than the modifications hereinafter specified.

Therefore, In consideration of the surrender of all the existing contracts and franchises of said company with the city of Hutchinson, excepting as hereinafter specified,

Be it ordained by the Mayor and Council of the city of Hutchinson, Kansas:

SECTION 1. That there is hereby given and granted to the Hutchinson Water, Light and Power Company, of Hutchinson, Kansas, its successors or assigns, the exclusive right and privileges for the term of twenty years from the date of the passage and approval of this ordinance of supplying the city of Hutchinson, Reno county, Kansas, and the inhabitants thereof, by a system of works with water for the prevention and extinguishment of fires and for all other purposes for which water may be used, (said water works to be the Holly system); with electric current for electric light and
22 power, and for all other purposes for which electric current may be used, except power for the operation of street railways, which exception shall not prevent said Water, Light and Power Company from furnishing electric currents to street railways for any and all purposes; and with gas for lighting, heating and for fuel, and for all other purposes for which gas may be used, in accordance with the terms and conditions set forth in this ordinance.

SECTION 2. That said Hutchinson Water, Light and Power Co., its successors or assigns, is hereby authorized to maintain, extend and operate said works in or adjacent to the city of Hutchinson, to receive, take, store, purify, conduct and distribute said water, electric current and gas through said city, to construct and extend aqueducts, mains, pipes and erect poles and wires through all the streets, alleys lanes and public grounds and to cross any stream or bridge in said city, to erect and maintain all engines, machinery and other appliances necessary for conducting any of said works, and for sup-

plying said city and the inhabitants thereof with water, electric current and gas for the purposes herein mentioned, and for such purposes the said Hutchinson Water, Light and Power Company, its successors or assigns, shall have the right, and is hereby authorized to use the streets, alleys, avenues, lanes and public grounds in or adjacent to said city, and shall have the right to take up any pavements or sidewalks, and made such excavations therein as may be necessary to lay, repair and maintain aqueducts, mains and pipes below the surface of the ground for conveying and distributing the water and gas, and for erecting poles for electric wires as aforesaid;

Provided, that the said Hutchinson Water, Light and Power Company, its successors or assigns, shall suitably guard and protect such excavations so as to prevent injury to persons and property by reason thereof, and

Provided further, that such excavations shall be filled and such pavements and sidewalks replaced in as good condition as before, and as soon as possible thereafter as the circumstances will permit.

SEC. 3. All water mains hereinafter ordained to be laid by
23 the city shall be so located as to comply with the general plan of water distribution of the system so as to avoid dead ends as far as practicable, and on all such extensions of water mains ordered by the city council, the said Hutchinson Water, Light and Power Company, its successors or assigns, shall erect not less than ten double nozzle fire hydrants to the mile, the location of such hydrants to be made by the city engineer as directed by the city council.

SECTION 4. The said city of Hutchinson hereby agrees to rent, and does rent for fire protection, the one hundred and eighty-five (185) fire hydrants now located on the mains of the said water works from the Hutchinson Water, Light and Power Company, its successors or assigns, for the full term of this contract, and the said city of Hutchinson will pay for the use of said one hundred and eighty-five (185) hydrants an annual rent of $6,000, payable semi-annually on the first days of May and November of each year, less $1,000 per year rebate for two years from the passage of this ordinance, payments to be made as hereinafter specified. For all hydrants located on extensions hereafter ordered by the city council, as specified in section 3 of this ordinance the city of Hutchinson agrees to pay thirty-six dollars ($36.00) per annum for each hydrant so located, payments to be made as hereinafter specified. The said Hutchinson Water, Light and Power Company shall furnish water for sprinkling the streets of the city of Hutchinson at the rate of $12.50 per month for each wagon or sprinkler used in sprinkling said streets for one year from and after the date of the passage and approval of this ordinance, and for the next succeeding year, or second year after the passage and approval of this ordinance the said Hutchinson, Water, Light and Power Company shall furnish water for such street sprinkling purpose at the rate of $15.00 per month for each wagon or sprinkler used in sprinkling said streets.

All water used for flushing sewers shall be furnished at such rates as may be mutually agreed upon, not exceeding the meter rates

specified in this ordinance, and after the expiration of two
24 years from the date of the passage and approval of this ordinance all water furnished by the said Hutchinson Water, Light and Power Company for the purpose of sprinkling streets shall be furnished at such rates as may be mutually agreed upon, not exceeding the meter rates specified in this ordinance. All water furnished for sprinkling streets shall be taken from tanks or through stand pipes erected by the city under such restrictions as may be imposed by the said Hutchinson Water, Light and Power Company as will prevent interference with the efficiency of the said water system and machinery for fire protection. The said city of Hutchinson shall have the right to pump and supply itself with water for sprinkling streets and flushing sewers at any and all times.

SECTION 5. In addition to furnishing water from the fire hydrants for the prevention and extinguishment of fires, as herein contemplated, the said Hutchinson Water, Light and Power Company its successors or assigns, shall furnish water to the said city and the inhabitants thereof living or doing business along the mains and pipes for all purposes, and in accordance with such rules and regulations as may be deemed necessary to the successful operation of said works, through any standard meters at not to exceed the following rates, the same to be paid either monthly, quarterly or yearly, in accordance with such rules and regulations as the managers of the water works may deem necessary for the successful operation of said works;

Provided, that the consumer shall have the right to purchase his meter of a kind acceptable to said Hutchinson Water, Light and Power Company from any person, and have the same properly set by any licensed plumber; and the said Hutchinson Water, Light and Power Company, its successors and assigns, shall receive a reasonable price for tapping its mains. No licensed plumber or any other person shall have the right to set any meter or any other plumbing fixtures in connection with any pipe supplying water from the water main of the system of said water works, nor make any extension of such pipes without obtaining a permit therefor
25 from the water works company.

Meter Rates.

5,000 or less gallons per month at 30 cents per 1,000 gallons.
5,000 to 10,000 gallons per month at 27½¢ per 1,000 gallons.
10,000 to 15,000 gallons per month at 25¢ per 1,000 gallons.
15,000 to 30,000 gallons per month at 20¢ per 1,000 gallons.
30,000 to 60,000 gallons per month at 18¢ per 1,000 gallons.
60,000 to 90,000 gallons per month at 16¢ per 1,000 gallons.
90,000 to 120,000 gallons per month at 14¢ per 1,000 gallons.
120,000 to 150,000 gallons per month at 12¢ per 1,000 gallons.
150,000 to 200,000 gallons per month at 10¢ per 1,000 gallons.
200,000 to 400,000 gallons per month at 9¢ per 1,000 gallons.
400,000 to 600,000 gallons per month at 8¢ per 1,000 gallons.
600,000 to 800,000 gallons per month at 7¢ per 1,000 gallons.
800,000 to 1,000,000 gallons per month at 6¢ per 1,000 gallons.
Over 1,000,000 gallons per month at 5¢ per 1,000 gallons.
Any consumer using water for sprinkling lawns and using 10,000

gallons or more per month shall have a rebate of 3 cents per 1,000 gallons from the foregoing meter rates. Minimum monthly bills on meters owned by consumers will be 25 cents. On meters owned by the company the minimum monthly bill will be on ⅝ inch, $1.00; ¾ inch, $2.00; 1 inch, $3.00; 1½ inch, $6.00; and 2 inches, $12.00.

The water company shall also have the right to supply water by special contract, when both parties to the contract can so agree, payment for same to be made in advance, either monthly or quarterly, and according to such rules as the water company may adopt.

SECTION 6. It is hereby agreed between the said Hutchinson Water, Light and Power Company, its successors and assigns, and the said City of Hutchinson, that all hydrant rental that becomes due and payable to the said Hutchinson Water, Light and Power Company, its successors or assigns, under the provisions of this contract, shall be paid in lawful money to the Fidelity Insurance, Trust and Safe Deposit Company of Philadelphia, Pa., or to such other
26 trustee of its bonds as the said Hutchinson Water, Light and Power Company, its successors or assigns, may direct, or to the order of the said Fidelity Insurance, Trust and Safe Deposit Company or other trustee of its bonds who may be named by said water company under this section, as the same may become due and payable; that is to say the city of Hutchinson shall pay to the order of said trust company, or other trustee of bonds who may be designated by the said water company under this section, all the hydrant rental, as the same shall become due and payable under the terms of this agreement, so long as this contract shall be in force, and until the works named in this contract shall become the property of the city of Hutchinson. In case of any change in trustee, the city shall be notified in writing.

SECTION 7. The machinery used in the water works constructed and contemplated under this contract shall have the capacity and be operated when required for the extinguishment of fires, so as to produce a pressure on the main at the works of 130 pounds. At such times no hydrant other than those used for the extinguishment of fires shall be opened.

SECTION 8. The city of Hutchinson shall have the right to purchase the works, property and business created, acquired, constructed and contemplated under this contract at any time after the expiration of ten years from the adoption of this ordinance, upon giving one year's notice to the owners of said property and upon paying to said owners a fair value for the same as may be mutually agreed, or fixed by a court of competent jurisdiction. Said one year's notice may be given at any time after the expiration of nine years from the date of the passage and approval of this ordinance.

SECTION 9. The said Hutchinson Water, Light and Power Company, its successors or assigns, shall not at any time use the poles, wires and other appliances provided for in this ordinance in such a manner as to hinder or obstruct the commerce and trade of the city, nor obstruct the proper use of the streets, alleys, lanes, ave-
27 nues, public grounds or other public places, excepting as may be necessary to make repairs, or extensions and improvements to its property and works.

SECTION 10. The said Hutchinson Water, Light and Power Company, its successors or assigns, shall at all times repair and make good any injuries which it may create in the erection, construction, maintenance or operation of the several works provided for in section one (1) of this ordinance, to any of the streets, alleys lanes, avenues, public grounds or other public places under control of the city, or any sidewalks, gutters, street railways and other improvements in the said streets, alleys, lanes avenues and public grounds under control of the city.

SECTION 11. Nothing in this ordinance shall be construed to prevent the city at any time from vacating any streets, alleys, avenues or lanes or changing or opening any new streets, lanes, avenues or public ground or any other public place in the city.

SECTION 12. The water supply, or place from which the water furnished by the Hutchinson Water, Light and Power Company is now, or may hereafter be taken, shall be guarded and protected by the said water company so far as may be reasonably possible, so as to supply clear potable water; and the city of Hutchinson agrees to exercise any or all of its rights and powers to prevent, stop and remove any and all contamination of such water supply and water. That is to say the city of Hutchinson shall exercise such rights and powers as it may legally have in the premises, when complaint is made, and the said water company cannot lawfully prevent, stop and remove such contamination. The said water company shall not be held responsible under this section for the failure of the city of Hutchinson to exercise its rights and powers as herein agreed. The city of Hutchinson shall have the right at all reasonable times to have pressure, specified in section 7 of this contract, tested. At all such tests, when made, not more than six fire streams shall be used at one time. These streams may be taken from any of the hydrants located by the city. The city of Hutchinson shall have the right to test the quality of the water at any time.

28 SECTION 13. The city of Hutchinson hereby agrees that it will pass all necessary ordinances for the protection of the property of the said water works, electric light works and gas works; to prevent the contamination of the water supply; to prevent the waste of water from the hydrants, mains, and pipes; to prevent all interference with its poles and wires, and that it will upon request of the said Hutchinson Water, Light and Power Company, its successors or assigns, proceed without delay to exercise its rights under the statutes of the state of Kansas, in the matter of the condemnation of any lot, parcel or piece of ground, or of water, or water privileges that may be necessary to the proper and convenient construction, maintenance and operation of the system of water, gas and electric light works contemplated in this ordinance.

Provided, That the said Hutchinson Water, Light and Power Company, its successors or assigns, pay all costs and expense incident thereto, including the cost of all property so condemned, and,

Provided, farther, That the right to free and exclusive control of all property so condemned shall rest and remain in the said Hutchinson Water, Light and Power Company, its successors or assigns.

SECTION 14. If the said Hutchinson Water, Light and Power Company, its successors or assigns, shall refuse to operate the water system contemplated in this ordinance at any time, that part of this franchise relating to the water system shall be forfeited, unless such failure to operate is unavoidable or due to accident.

SECTION 15. Nothing in this ordinance shall prevent any person or company from manufacturing gas, electricity or any other material for his or their own use for light or fuel, but in no case shall such persons supply others with gas or electric current for any purpose.

SECTION 16. All ordinances heretofore granted to the Hutchinson Water, Light and Power Company, or its predecessors, ex-
29 cepting ordinance No. 206, approved April 29, 1890, and that portion relating to telephones of ordinance No. 3, entitled "An ordinance to provide for the erection of poles, wires and other appliances in the streets, alleys and public grounds of the city of Hutchinson for the purpose of operating the electric lights and telephones," which was assigned to the Missouri & Kansas Telephone Company by the Hutchinson Water, Light and Power Company, August 27, A. D. 1889, are hereby repealed.

SECTION 17. This ordinance shall continue and be in force for the full term of twenty years after its publication once in the Hutchinson Daily News, and at the expiration of the said twenty years, unless the works and property thereto appertaining shall have become the property of the city of Hutchinson, it shall continue and be in force until such works and property thereto appertaining shall have become the property of the said city of Hutchinson.

SECTION 18. This ordinance and contract shall take effect and be in force from and after its publication in the Hutchinson Daily News and its acceptance in writing, filed with the city clerk by the Hutchinson Water, Light and Power Company, and the release of the city of Hutchinson from farther liability in the water contract now existing with said Hutchinson Water, Light and Power Company.

Approved March 5, 1897.

Attest:

[SEAL.]

FRANK VINCENT, *Mayor.*
W. R. UNDERWOOD,
City Clerk.

30 The foregoing ordinance was passed at a regular adjourned meeting of the Mayor and Councilmen of the City of Hutchinson, Reno County, Kansas, held at the Council Chamber of said City on Thursday, the 2nd day of March, 1897, and was published in the Hutchinson Daily News March 17, 1897.

Final Vote recorded on page 279, Journal No. 5.

W. R. UNDERWOOD,
City Clerk.

Minutes of the meeting of the board of directors of the Hutchinson Water, Light and Power Company on March 15, 1897, at the office of the company in Hutchinson.

All of the directors notified to be present and consented to this meeting.

Present, a quorum, consisting of H. Whiteside, J. E. Conklin, S. F. Hutton.

On motion the President and Secretary were authorized to accept the Franchise and Contract adopted by the City of Hutchinson, March 2, 1897, as a substitute for pre-existing contract and to give the City notice of such acceptance.

I, S. F. Hutton, Secretary of the Hutchinson, Water, Light and Power Company, certify that the within and foregoing is a copy of the minutes of the meeting of the Directors of the Hutchinson Water, Light and Power Company on March 15, 1897.

Witness my hand and seal this 15th day of March, 1897.

[SEAL.] S. F. HUTTON, *Secretary.*

To the City of Hutchinson, the Mayor and Council thereof:

The Hutchinson Water, Light and Power Company, of Hutchinson Kansas, hereby accepts the ordinance attached hereto, and adopted by the city of Hutchinson, on March 2, 1897, as a substitute for pre-existing contract for light, and notice is hereby given the City of Hutchinson of the acceptance, as required by section 18 of said ordinance No. 402.

THE HUTCHINSON WATER, LIGHT AND POWER CO.,
By H. WHITESIDE, *President.*

Attest:

[SEAL.] S. F. HUTTON, *Secretary.*

31 I, Wm. R. Underwood, Clerk of the city of Hutchinson, Reno county, Kansas, do hereby certify that the above are true copies of the acceptance of ordinance No. 402, and of the minutes filed in this office and attached to said ordinance No. 402.

[SEAL.] W. R. UNDERWOOD,
City Clerk.

I, George S. Bourne, clerk of the City of Hutchinson at this date, hereby certify the above and foregoing to be a correct copy of Ordinance No. 402, as found recorded in the Ordinance Book of the City of Hutchinson, Vol. 3, pages 301 to 307, and of the acceptance of the same, as recorded in same book, page 309. Witness my hand and the official seal of the city of Hutchinson, Reno county, Kansas, this 5th day of May, 1903.

[SEAL.] GEO. S. BOURNE,
City Clerk.

CHICAGO, *December* 1, 1902.

Messrs. Mason, Lewis & Company, Monadnock Block, City.

GENTLEMEN: I have examined the charter and records of the Water, Light and Gas Company, of New Jersey, the ordinance of the City of Hutchinson, Kansas, under which said company operates its electric light, water and gas plant in that city, its issue of bonds dated August 1, 1902, in the sum of $400,000 due August 1, 1932, with interest at five per cent. per annum, payable semi-annually, and the trust deed to the American Trust and Savings Bank, of Chicago, as Trustee, securing the same, together with the opinions and abstracts of title covering the premises in the city of Hutchinson, Kansas, comprising the Hutchinson plants of said Company conveyed in said trust deed, and from such examination I am of opinion that said Company has good title to said ordinance and premises, and that said bonds and trust deed are a valid and first lien on the franchises, rights of way and all other property of said Company now owned or hereafter to be acquired, together with the rents, issues and profits thereof, situate in the City of Hutchinson, Kansas, except that there is outstanding and unreleased a
32 prior trust deed from the Hutchinson Water Light and Power Company to the Fidelity Insurance Trust and Safe Deposit Company of Philadelphia, Trustee, due January 1, 1928, in the sum of $212,500 with interest at four per cent. per annum, payable semi-annually, for the payment of which provision is made in said trust deed of August 1, 1902, by the reserve of bonds.

Very truly yours,

(Signed) EUGENE E. PRUSSING.

33 Endorsed: No. 1108. The Water, Light & Gas Co. *vs.* The City of Hutchinson, *et al.* Bill of Complaint. Filed M'ch 12, 1906. Geo. F. Sharitt, Clerk, By J. F. Shearman, D. C. H. Whiteside, Fairchild & Lewis & F. Doster for Pl'ff.

34 In the Circuit Court of the United States, District of Kansas.

No. —.

THE WATER, LIGHT & GAS CO., Plaintiff,

vs.

THE CITY OF HUTCHINSON ET AL., Defendant-.

To the Clerk of said Court:

Please issue subpœna summons in the above entitled cause for the City of Hutchinson, J. P. Harsha, Mayor, J. E. Hostutler, L. A. Beebe, M. J. Hults, C. W. Oswald, F. G. Delano, John Blair, W. E. Long, C. Heward, F. M. McDermed, C. O'Neal, C. I. Parks, W. S. Thompson, Councilmen, & S. F. Johnson, Clerk & The People's Water, Light & Power Company, a corporation all of Hutchinson, Kansas, commanding them to be and appear in the above cause and

answer the bill of complaint filed therein by complainant as required by law.

H. WHITESIDE.

Endorsed: No. 1108. Precipe. Filed M'ch 12, 1906. Geo. F. Sharitt, Clerk, By J. F. Shearman, D. C.

35 Form No. 143.

Chancery Subpœna.

UNITED STATES OF AMERICA,
District of Kansas, Second Division, ss:

The United States of America to The City of Hutchinson, J. P. Harsha, Mayor, J. E. Hostutler, L. A. Beebe, M. I. Hults, G. F. Oswald, F. G. Delano, John Blair, W. E. Long, W. S. Thompson, C. Howard, F. M. McDermed, C. O'Neal, and C. I. Parks, Councilmen, and S. F. Johnson, City Clerk of said City and The People's Water, Light and Power Company of Hutchinson, Kansas, a corporation, Greeting:

We command you and every one of you, that you appear before our Judge of our Circuit Court of the United States of America for the District of Kansas, Second Division, at the City of Wichita on the First Monday in the month of May next, to answer the bill of complaint of The Water, Light & Gas Company, a Corporation this day filed in the Clerk's Office of said Court, in said City of Wichita then and there to receive and abide by such judgment and decree as shall then or thereafter be made, upon pain of judgment being pronounced against you by default.

To the marshal of the district of Kansas to execute.

Witness, The Hon. Melville W. Fuller, Chief Justice of the Supreme Court of the United States of America, at the City of Wichita in said District, this 12th day of March in the year of our Lord one thousand nine hundred and six.

[SEAL.] GEO. F. SHARITT, *Clerk,*
By J. F. SHEARMAN, *Deputy.*

36 *Memorandum.*

The above-named defendants are notified that unless they enter their appearance in the Clerk's Office of said Court, at the City of Wichita aforesaid, on or before the day to which the above writ is returnable, the complaint will be taken against them as confessed, and a decree entered accordingly.

GEO F. SHARITT, *Clerk,*
By J. F. SHEARMAN, *Deputy.*

Marshal's Return.

Received this writ at Wichita, Kansas, March 12th, 1906, and served the same upon the within named, The City of Hutchinson, by delivering to J. P. Harsha, Mayor, personally, a true and certified copy of this writ with all endorsements thereon.

Upon J. P. Harsha, Mayor, J. E. Hostutler, L. A. Beebe, G. F. Oswald, F. C. McDermed, W. E. Long, C. I. Parks, M. I. Hutts, F. G. Delano, John Blair, C. Howard, C. O'Neal, Councilmen, and S. F. Johnson, City Clerk of said City, by delivering to each personally a true and certified copy of this writ, with all endorsements thereon.

Upon the People's Water, Light and Power Company, of Hutchinson, Kans. a corporation, by delivering to Emerson Carey, President personally, a true and certified copy of this writ with all endorsements thereon, at Hutchinson, Kansas, on the 20th day of March, 1906.

W. S. Thompson, Councilman, not served, not found in my District.

Fees: $32.88.

WILLIAM H. MACKEY, JR.,
United States Marshal,
By C. F. BIDDLE, *Deputy.*

37 Endorsed: No. 1108. Circuit Court of the United States, District of Kansas, Second Division. The Water, Light & Gas Co. *vs.* The City of Hutchinson *et al.* Chancery Subpœna. Returnable to Rule day first Monday in May, A. D. 1906. Geo. F. Sharitt, Clerk, By J. F. Shearman, Deputy. Filed M'ch 22, A. D. 1906. Geo. F. Sharitt, Clerk. H. Whiteside, Fairchild & Lewis, and Frank Doster. Complainant's Solicitor.

38 In the Circuit Court of the United States, District of Kansas, Second Division.

THE WATER, LIGHT & GAS COMPANY, Complainant,
vs.
THE CITY OF HUTCHINSON ET AL., Defendants.

Cost Bond.

We, the undersigned, The Water, Light & Gas Company, W. E. Hutchinson and The American Surety Company of New York, hereby enter and bind ourselves as security for costs in the above case, and promise to pay all costs which may accrue, not to exceed $300.00, to the opposite parties in this action, or to any officer of this Court; and in default of payment by plaintiff of any costs ordered or adjudged to be paid by said plaintiff.

We hereby agree and stipulate that execution may issue against us and our property for any costs taxed against the complainant.
Dated March 14, 1906.

(Signed) THE WATER, LIGHT & GAS CO.,
By W. E. HUTCHINSON, *Pres't.*
[SEAL.] THE AMERICAN SURETY CO. OF NEW YORK,
By A. W. EAGAN, *Resident Vice Pres't.*
Attest: L. E. FONTRON, *Res. Ass't Sec'y.*

Endorsed: No. 1108. Cost Bond. Filed and approved M'ch 15, 1906. Geo. F. Sharitt, Clerk, By J. F. Shearman, D. C.

39 In the Circuit Court of the United States for the District of Kansas, Second Division.

No. 1108.

THE WATER, LIGHT & GAS COMPANY, Complainant,
vs.
THE CITY OF HUTCHINSON, J. P. HARSHA, Mayor; J. E. HOSTUTLER, L. A. BEEBE, M. I. HULTS, G. W. OSWALD, F. G. DELANO, JOHN BLAIR, W. E. LONG, W. S. THOMPSON, C. HOWARD, F. MCDERMED, C. O'NEAL, and C. I. PARKS, Councilmen, and S. F. JOHNSON, City Clerk of said City of Hutchinson, and THE PEOPLES WATER, LIGHT AND POWER COMPANY, of Hutchinson, a Corporation, Defendants.

The Joint and Several Demur-er of each of the above named Defendants to the Bill of Complaint of the Water, Light & Gas Company, the above named plaintiff.

These defendants respectfully, by protestation not confessing or acknowledging all of the matters and things in said Plaintiff's Bill to be true in such manner and form as the same are therein set forth and alleged, demur thereto and for cause of demur-er show that the said Plaintiff has not in and by the said bill made or stated any such cause or doth or ought to entitle it to any relief as is thereby sought and prayed for against these defendants.

Wherefore and for divers other good causes of demur-er appearing in said bill these defendants demur thereto and humbly demand the judgment of this Court whether they shall be compelled to make any further or other answer to said bill, and prays to be hence dismissed with their costs and charges in this behalf most wrongfully sustained.

A. C. MALLOY AND
PRIGG & WILLIAMS,
Attorneys for Defendants.

DISTRICT OF KANSAS, *Sedgwick County, ss:*

S. F. Johnson makes solemn oath and says he is one of the
40 above named defendants, and that the foregoing demur-er is not interposed for delay, and that the same is true in point of fact.

S. F. JOHNSON.

Subscribed and sworn to before me this 20th day of March, 1906.
[SEAL.] W. N. SIDLINGER,
Notary Public.

Commission Expires Aug. 5, 1906.

We hereby certify that in our opinion the foregoing demur-er is well founded in point of law.

A. C. MALLOY AND
PRIGG & WILLIAMS,
Att'ys.

Endorsed: No. 1108. In Circuit Court of the United States District of Kansas, Second Division. The Water, Light & Gas Co., Complainant *vs.* The City of Hutchinson, *et al.*, Defendants. Demurrer. Filed M'ch 21, 1906. Geo. F. Sharitt, Clerk, By J. F. Shearman, D. C.

41 In the Circuit Court of the United States, District of Kansas, Second Division.

No. 1108.

THE WATER, LIGHT & GAS CO., Plaintiff,
vs.
THE CITY OF HUTCHINSON, J. P. HARSHA, Mayor; J. E. HOSTUTLER, L. A. BEEBE, M. I. HULTS, G. W. OSWALD, F. G. DELANO, JOHN BLAIR, W. E. LONG, W. S. THOMPSON, C. HOWARD, F. McDERMED, C. O'NEAL, and C. I. PARKS, Councilmen; and S. F. JOHNSON, City Clerk of said City of Hutchinson, and THE PEOPLES WATER, LIGHT & POWER CO., of Hutchinson, a Corporation, Defendants.

Petition to File Supplemental Bill.

To the Honorable Judge of the Circuit Court of the District of Kansas, Second Division:

Your petitioner, The Water, Light & Gas Company, comes now and shows to the Court that on March 12, 1906, it filed in the above court its bill of complaint, aver-ing in brief, that on the — day of ——, 1897, The Water, Light & Power Company, of Hutchinson, Kansas, by reason of certain considerations and concessions in said bill set out, obtained and was entitled to exclusive franchises and

contracts to furnish the defendant, the City of Hutchinson, and the inhabitants thereof water, light, heat & power according to an ordinance set out in said bill of complaint, numbered 402, and that after the issuance and acceptance of said ordinance and the performance of certain acts thereunder, your petitioner with assent of the said city bought and became owner of the properties,
42 franchises and contracts of the said Water, Light & Power Company, and as owner and substitute furnished said city and its inhabitants water, light, heat and power service, and greatly extended and improved its facilities for so doing.

That later to-wit, on the — day of —— 1906, the said city, through its Mayor and Councilmen ignored the rights, franchises and contracts owned by your petitioner and granted to the Peoples Water, Light & Power Company, one of the defendants, a franchise and contract to do and perform the same things covered by the exclusive contract and franchise of your petitioner, without any offer to restore the consideration given by the said Water, Light & Power Co., in the first instance, in order to obtain its said prior and exclusive rights; and that the said Peoples Water, Light & Power Company intended to use its said franchise and contract to the irreparable damage and injury of your petitioner, and praying for an injunction to prevent the defendants from attempting to organize and use the contract and franchise granted to the said Peoples Water, Light & Power Company, and praying also that the same be declared null and void, as well as praying for general relief, your petitioner refers to said bill of complaint for more complete exhibition herein; and further avers that after the filing of said bill of complaint and after the defendants had notice that it was filed, and that a temporary injunction, among other thing-, would be applied for, the said defendants met, to-wit, on the 14th of March, 1906, just before the service of subpœnas and with haste to anticipate subpœnas and the Mayor and Councilmen of the city of Hutchinson, named as defendants herein, in special session assembled, granted to the Peoples Water, Light & Power Company, a specific contract, to light the streets and alleys of said city for 10 years with 100 arc electric lamps, at the price of $75.00 per annum for each light, payable monthly, making $75,000 to be paid for said lights.

Your petitioner asks leave to file a supplemental bill herein, reciting and covering the said acts of defendants after the filing of the original bill herein, and praying that the injunction and
43 relief of the Honorable Court, both interlocutory and final also be extended to the said specific contract granted on March 14th, 1906, and all rights and proceedings thereunder.

Your petitioner avers that the defendants have already entered their appearance in this action.

H. WHITESIDE,
FAIRCHILD & LEWIS, &
FRANK DOSTER,
Solicitors for Plaintiff.

Service acknowledged March 28, 1906.

C. M. WILLIAMS &
A. C. MALLOY,
Solicitors for D'f'ts.

Endorsed: In Equity. In C. C. U. S. Dist. Ks. No. 1108. The Water, Light & Cas Co. *vs.* The City of Hutchinson *et al.* Petition to file Supplemental Bill. H. Whiteside *et al.*, Hutchinson, Kansas, Attorneys for Plff. Filed Mch. 31, 1906. Geo. F. Sharitt, Clerk, By J. F. Shearman, D. C.

44 In the Circuit Court of the United States, District of Kansas, Second Division.

No. 1108.

THE WATER, LIGHT & GAS CO., Complainant,
vs.
THE CITY OF HUTCHINSON, J. P. HARSHA, Mayor; J. E. HOSTUTTLER, L. A. BEEBE, M. I. HULTS, G. W. OSWALD, F. G. DELANO, JOHN BLAIR, W. E. LONG, W. S. THOMPSON, C. HOWARD, F. McDERMED, C. O'NEAL, and C. I. PARKS, Councilmen, and S. F. JOHNSON, City Clerk of said City of Hutchinson, and THE PEOPLE'S WATER, LIGHT & POWER CO., of Hutchinson, a Corporation, Defendants.

Notice of Application to File Supplemental Petition.

The above defendants and A. C. Malloy and C. M. Williams, their solicitors, are notified that on the 9th day of April, 1906, at 10 A. M., of the clock in the Federal Court House, in the City of Topeka, Kansas, the plaintiff will present to the Honorable Judge of the above court its petition to file a supplemental bill of complaint in the above court, a copy of the petition is attached hereto and made a part hereof, marked "A."

H. WHITESIDE,
FAIRCHILD & LEWIS,
FRANK DOSTER,
Solicitors for Complainant.

Service acknowledged M'ch 28, 1906.

C. M. WILLIAMS &
A. C. MALLOY,
Solicitors for Def'ts.

Endorsed: No. 1108. Proof service Notice of application to file supplemental petition. Filed M'ch 31, 1906. Geo. F. Sharitt, Clerk By J. F. Shearman, D. C.

45 In the Circuit Court of the United States, District of Kansas, Second Division.

No. 1108.

THE WATER, LIGHT & GAS CO., Complainant,
vs.
THE CITY OF HUTCHINSON, J. P. HARSHA, Mayor; J. E. HOSTUTTLER, L. A. BEEBE, M. I. HULTS, G. W. OSWALD, F. G. DELANO, JOHN BLAIR, W. E. LONG, W. S. THOMPSON, C. HOWARD, F. McDERMED, C. O'NEAL, and C. I. PARKS, Councilmen, and S. F. JOHNSON, City Clerk of said City of Hutchinson, and THE PEOPLES WATER, LIGHT & POWER CO., of Hutchinson, a Corporation, Defendants.

Motion for Temporary Order of Injunction.

Comes now The Water, Light & Gas Company, complainant in the above entitled cause, and moves the above Honorable Court and Judges thereof, to grant complainant a temporary order of injunction in the above entitled cause, to restrain the defendants, and each of them, until the termination of this suit, or further order of the Court, from doing the matters and things sought to — restrained in the bill of complaint, and the supplemental bill filed herein, in substance, to-wit, from interfering in any manner with the contracts, rights and franchises granted by the City of Hutchinson and owned and operated by the complainant, as set out in its bill of complaint, & from executing and attempting to execute any of the contracts and franchises granted by the City of Hutchinson to the defendant, The Peoples Water, Light & Power Company, as set out in said bill of complaint and the supplemental bill filed herein. Upon the grounds and the facts set out in said bills above mentioned, and the affidavits filed herewith.

H. WHITESIDE,
FAIRCHILD & LEWIS,
FRANK DOSTER,
Solicitors for Pl'ff.

Service acknowledged March 28, 1906.

C. M. WILLIAMS &
A. C. MALLOY,
Solicitors for Def'ts.

46 Endorsed: In Equity. In C. C. Cts. U. S. Dist. Ks. No. 1108. The Water, Light & Gas Co. *vs.* The City of Hutchinson *et al.* Motion for temporary order of injunction. H. Whiteside *et al.* Hutchinson, Kansas. Attorneys for Pl'ff. Filed M'ch 31, 1906. Geo. F. Sharitt, Clerk. By J. F. Shearman, D. C.

47 In the Circuit Court of the United States, District of Kansas, Second Division.

No. 1108.

THE WATER, LIGHT & GAS CO., Complainant,

vs.

THE CITY OF HUTCHINSON, J. P. HARSHA, Mayor; J. E. HOSTUTLER, L. A. BEEBE, M. I. HULTS, G. W. OSWALD, F. G. DELANO, JOHN BLAIR, W. E. LONG, W. S. THOMPSON, C. HOWARD, F. MCDERMED, C. O'NEAL and C. I. PARKS, Councilmen; and S. F. JOHNSON, City Clerk of said City of Hutchinson, and THE PEOPLES WATER, LIGHT & POWER CO., of Hutchinson, a Corporation, Defendants.

Notice: Motion for a Temporary Order of Injunction.

To the defendants above named and A. C. Malloy and C. M. Williams, their Solicitors:

Your are hereby notified that on the 9th day of April, 1906, at the hour of 10 A. M., or as soon thereafter as may suit the convenience of the court, in the Federal Court House in the City of Topeka, Kansas, the complainant will apply to the Honorable Judge of the above court for a temporary order of injunction, to restrain the defendants, and each of them, from attempting to carry out and execute the contract and franchises sought to be restrained in the bill of complaint, and particularly ordinance No. 661, and a contract made between defendants, on March 14th, 1906, referred to in supplemental bill; copy of motion is attached hereto.

H. WHITESIDE,
FAIRCHILD & LEWIS,
FRANK DOSTER,
Solicitors for Complainant.

Service acknowledged Mch. 28, 1906.

C. M. WILLIAMS &
A. C. MALLOY,
Solicitors for Def'ts.

48 Endorsed: No. 1108. Proof Service Notice of Application for Temporary Injunction. Filed Mch. 31, 1906. Geo. F. Sharitt, Clerk, By J. F. Shearman, D. C.

49 In the Circuit Court of the United States, District of Kansas, Second Division.

No. 1108.

THE WATER, LIGHT & GAS CO., Complainant,

vs.

THE CITY OF HUTCHINSON, J. P. HARSHA, Mayor; J. E. HOSTUTLER, L. A. BEEBE, M. I. HULTS, G. W. OSWALD, F. G. DELANO, JOHN BLAIR, W. E. LONG, W. S. THOMPSON, C. HOWARD, F. MCDERMED, C. O'NEAL and C. I. PARKS, Councilmen; and S. F. JOHNSON, City Clerk of said City of Hutchinson, and THE PEOPLES WATER, LIGHT & POWER CO., of Hutchinson, a Corporation, Defendants.

Supplemental Bill.

The Water, Light & Gas Company, complainant, of the State of New Jersey, brings its supplemental bill against the defendants above named, all of the State of Kansas.

And thereupon your orator complains and says: That it filed in this Court, its original bill against defendants, on the 12th day of March, 1906, wherein it recited that it was the owner of and operated certain exclusive grants, contracts and franchises from the City of Hutchinson, Kansas, issued for, and in consideration of, certain benefits and concessions made to said City. And that said City, through its Mayor and councilmen, in disregard of Complainant's exclusive rights and contracts, granted to the defendant, The People's Water, Light & Power Company, certain other franchises and contracts, to do the same things secured and intended to be secured to complainant. And that the defendants were about to execute said franchises and contracts infringing upon complainant's rights to the irreparable damage of complainant; and praying that the defendants be enjoined by temporary and final injunction from interfering with the rights, franchises and contracts of complainant and executing or seeking to execute the franchises, and contracts granted by the said city to the Peoples Water, Light & Power Company, its heirs and assignees; and also praying for other re-
50 lief, all as stated in the said original bill.

Your orator avers and shows, that after the filing of its original bill, (before the Marshal could serve subpœna) but with notice that the same was filed and that a temporary, as well as a final injunction would be applied for, to-wit, on the 14th day of March, 1906, the said defendants met and The Peoples Water, Light & Power Company made a proposition to the Mayor and Councilmen of the City of Hutchinson, then and there assembled, that it furnish the said City, for the purpose of lighting its public streets and alleys, 100 electric light lamps, at the price of $75.00 per lamp per annum. for the space of 10 years from the date of the installation and use of

said lamps. A copy of said proposition is attached hereto and made a part hereof, marked Exhibit "A." Your orator avers that said proposition was accepted by a resolution passed by the Mayor and Councilmen of said City, a copy of which is attached hereto and made a part hereof, marked Exhibit "B." That all of the above facts occurred without any notice to complainant, or regard for its prior exclusive grants and franchises, and with no offer, either of competition or compensation to complainant. Your orator avers that by granting said specific contracts, the said defendants have infringed, and still so infringe, and causes your orator to feel that in the future they will further infringe upon the exclusive rights, contracts, and franchises granted to and intended to be secured to your orator. Your orator avers that its damage will be irreparable, and the same will amount to more than $2,000. And also that the defendants have entered an appearance in this cause.

Wherefore, your orator prays, that in addition to the relief prayed for in its original bill, that your Honors will grant it a temporary, and also a permanent injunction against the defendants, and each of them, their agents, employees and successors, from executing and attempting to execute the above specific contract, and that said contract, on final hearing, shall be held null and void, as impairing the obligations of the said prior contracts and franchises granted to complainant. Also for such other relief, as may be necessary to make complete and full, the remedies, to which complainant may
51 be entitled in equity and good conscience.

And to the end that defendants may, if they can, show that your orator should not have the relief prayed for in the premises; and that they make full recourse and recovery on all the matters and things, averred by complaint aforesaid, by full and true answer to said matters and things.

Your orator further prays your Honors to grant an order against the defendants, and each of them, commanding that at a certain time and under penalties to be fixed by this Honorable Court, they make full, true and perfect answer to all and singular, the premises, and to stand by, perform and abide such orders, directions and decree as may be made against them, as shall seem meet and agreeable in equity.

And your orator will ever pray.

H. WHITESIDE,
FAIRCHILD & LEWIS,
F. DOSTER,
Solicitors for Complainant.

STATE OF KANSAS, *Reno County, ss:*

H. Whiteside being duly sworn says that he is the authorized agent and attorney of the complainant, a corporation in the above entitled suit. That he has read the above and foregoing supplemental bill, and the facts stated therein are true.

H. WHITESIDE.

Subscribed and sworn to before me this 9th day of April, 1906.

——, ——.

The following proposition was read:

To the Honorable Mayor and Councilmen of the City of Hutchinson, Kansas:

52 The People's Water, Light & Power Company make you the following proposition: We will agree to furnish the City of Hutchinson for the purpose of lighting its public streets and alleys, one hundred (100), seven and one-half ampere inclosed arc alternating current lamps as heretofore adopted by the City Council to be located at such places as the Council may determine for the price of Seventy Five ($75.00) per lamp per year, each lamp to be lighted for Three Thousand Six Hundred (3600) hours during the year, or in other words, to be lighted all night, every night, provided that the number of hours each lamp shall be lighted during the year shall not exceed thirty-six hundred (3600) hours.

Said contract to be continued for a period of ten years from the date of the installation and use of said lamps.

We further agree that at any time after five (5) years that if by reason of improvement in lighting service or improvement in the facilities for the furnishing of lights shall be made or can be obtained reduce the cost of and that will be advantageous to the City, and lessen the price of lights to said City, we agree to make such change in the lights, or in the character of service that will result in benefit to the City, provided the same can be done without loss to this Company.

The price to be paid for the lights herein specified to be apportioned and paid monthly upon presentation of bills by the People's Water, Light & Power Company. The People's Water, Light & Power Company agree to purchase the material and install said lights as soon as it is practical to do so. Delay by litigation and unavoidable casualities excepted.

In the event of a sale of the Light Plant of said Company the City shall have the refusal for sixty (60) days to buy the same at price for same for which said Company can sell the same.

THE PEOPLE'S WATER, LIGHT & POWER CO.,
By C. M. WILLIAMS, *Vice-Pres.*

The following Resolution was read and adopted:

53 Resolved that the proposition of the People's Water, Light & Power Company made this 13th day of March, 1906, to furnish the City One Hundred (100) Lights ever- night all night, rate Seventy-five (75.00) per light per year be accepted and that the City Attorney be instructed to formulate a contract embodying said proposition and that the Mayor and Clerk be instructed to sign the same with said Company.

J. P. HARSHA, *Mayor.*

Attest:
S. F. JOHNSON, *City Clerk.*

No further business, Council then adjourned.

—— ——, *City Clerk.*

5—54

Endorsed: No. 1108. Circuit Court of United States, District of Kansas, Second Division. Water, Light & Gas Co., *v.* City of Hutchinson, *et al.* Supplemental Bill. Filed Apr. 11, 1906, Geo. F. Sharitt, Clerk, By J. F. Shearman, D. C. H. Whiteside, H. S. Lewis, Waggener, Doster & Orr, For Complainant.

54 In the Circuit Court of the United States, District of Kansas, Second Division.

No. 1108.

THE WATER, LIGHT & GAS CO., Complainant,

vs.

THE CITY OF HUTCHINSON, J. P. HARSHA, Mayor; J. E. HOSTUTTLER, L. A. BEEBE, M. I. HULTS, G. W. OSWALD, F. G. DELANO, JOHN BLAIR, W. E. LONG, W. S. THOMPSON, C. HOWARD, F. McDERMED, C. O'NEAL, and C. I. PARKS, Councilmen, and S. F. JOHNSON, City Clerk of said City of Hutchinson, and THE PEOPLE'S WATER, LIGHT & POWER CO., of Hutchinson, a Corporation, Defendants.

Affidavit.

Now comes H. Whiteside, and being first duly sworn says: That in the year 1895 he became attorney for the Trustee and bondholders of The Hutchinson Water, Light & Power Company. That as such, he ascertained the company and its stockholders were insolvent, and that it would be necessary for the Trustee to take possession of the property, either through litigation, or by arrangement with the stockholders and officers of the company. The officers were Mr. L. A. Bigger, President, and Mr. L. A. Beebe, Manager, and these parties also controlled the stock of the company. Affiant ascertained that these parties together with two other persons, owed a large promissory note, either to, or held by The Penn Mutual Life Insurance Company of Philadelphia, amounting to $60,000 or $80,000. The said L. A. Bigger and L. A. Beebe, proposed in substance to affiant, that if this note, held by The Penn Mutual Life Insurance Company was surrendered, and some minor concessions were made, they would turn over the stock to the bondholders; and also the offices and property of the company. Affiant advised The Penn Mutual Life Insurance Company, the bondholders and the Trustee to accept this proposition and they did so. The bondholders and the holders of the promissory note making some arrangement among themselves about the surrender of the same. As a result of the negotiation the stock of the company was transferred to a Trustee for the
55 bondholders, and the said L. A. Bigger and L. A. Beebe resigned their offices in the said company and turned over the books, papers and properties of the company to the affiant as agent and attorney of the Trustees and bondholders. Affiant became president of the company, Mr. S. F. Hutton and J. E. Conklin also became

directors and officers of the company; and Mr. L. A. Beebe was employed temporarily to act as superintendent. At the time that affiant became connected as attorney with the Trustees and bondholders, as aforesaid, he ascertained that the City of Hutchinson had ceased to pay its obligations, and that it solicited a negotiation in regard to some kind of a settlement of its indebtedness to the company and to make an arrangement, by which it could take care of its future obligations to the company. After affiant became President, these negotiations continued. There was no dispute about the quality of the service or about the contracts and franchises, but the city claimed that it was not able to pay and carry out its contracts. Affiant felt that he was unable to effect a settlement with the city, unless he had the assistance of some one, who was not complicated with the questions, and who had experience in managing matters that appertained to municipal contracts and franchises. Thereupon he requested the Trustees of the bondholders to send Mr. J. S. Drake to assist in making a settlement with the city. So Drake came, and after considerable negotiation, in which Mr. Drake and affiant specially represented the Water, Light & Power Company and Mr. Frank Vincent, the Mayor, with his Council, represented the city, an agreement was made in substance, as was stated in the bill of complaint. That is to say, the city at that time owed the Water, Light & Power Company about $12800; and also had outstanding contracts for hydrant rentals at $12600 per annum with 8 years to run. It had the right to buy the water plant, but not the right to buy the electric light and gas plants. In consideration that the water company would remit $6400 from the cash indebtedness that was due to it from the City and would reduce the hydrant rental of 185 hydrants from $12,600 to $6,000 per annum for the same service, and would
56 grant the city the right to buy the gas and electric light plants, as well as the water plant, the city would do and perform all the things proposed in Ordinance No. 402, a copy of which is attached to the bill of complaint. Affiant says that the reduction of the hydrant rental to $36.00 per hydrant made it very low. But he was anxious, and so was Mr. Drake, to make an arrangement, which the City would be able to live up to and which it would live up to, and which would be upheld in the Courts. Since the stability and certainty was among the main things, which gave value to the property of the company. Ordinance No. 402 was passed and accepted and the remissions were made by The Water, Light & Power Company as therein agreed upon. And these remissions were all accepted and kept by the city. At the same time Ordinance No. 403, a copy of which is filed herewith, was passed, by which the existing dependent contract for lights was in effect continued until the expiration of 5 years from its date. And this item of agreement was one of the various items which led to the agreement upon Ordinance No. 402. At the expiration of said dependent contract or agreement with the assistance of Mr. Morse, the new superintendent, a new dependent contract was made, fixing the number and price of arc lights at $83 for all night lights and $55 for half night lights; that it was necessary, in order to furnish half night service, to estab-

lish a new circuit at large expense to the company. The price fixed for the lights, considering the small number of lights taken, was very reasonable indeed, and lower than the average in the State of Kansas. It is the judgment of affiant, from several years' experience in connection with the company, that all their arrangements were extremely generous on the part of the company to the city; that its large concessions were entitled to a literal respect on the part of the city for all the literal terms of Ordinance No. 402.

Affiant further says that he is attorney for The Water, Light & Gas Company, and after the expiration of the said dependent contract fixing the amount and value of lights, up to August 20, 1905 on agreement he tried to get the Mayor and Councilmen to modify an order they had spread on their journal August 4, 1905, commanding the new company to turn off the street lights in said city, and
57 to cease lighting the streets on and after August 20, 1905.

That he went before the Council on one occasion and made a long argument to effect that in justice to the company and the citizens that the lights ought to be turned on upon *quantum meruit,* if the city and company could not agree as to the value of the lights. Affiant says that his efforts to agree with the city upon a *quantum meruit,* in case the parties could not agree upon a specified price for the lights were fruitless. Affiant says that prior to the filing of the bill of complaint in this cause, The People's Water, Light & Power Company was organized, composed in part of parties who were associated in business with the Mayor and Councilmen of said city, and no doubt with the tacit understanding, if not an express promise, that it would be granted not only a franchise to furnish Water, light, power and gas to the city of Hutchinson and its people; but also specified contracts for light. Affiant says that on the day after the bill of complaint was filed in this case, he notified the att'y & President of the People's Water, Light & Power Company and the counsel for the city, Mr. C. M. Williams, that he had filed the bill of complaint herein and that the subpœnas would be immediately served by the U. S. Marshal. And also that on the Thursday following he expected to ask the Court, for The Water, Light & Gas Company, for a temporary order of injunction against the Mayor and Council, and The People's Water, Light & Power Company, to prevent them from carrying out and enforcing certain ordinances granted by the Mayor and Council to said company. That, thereupon, on the same evening, the Mayor and Councilmen were convened in special session and immediately granted to The People's Water, Light & Power Company a contract for 100 lights for 10 years at $75 per annum per light. Affiant is informed and believes that this sudden and quick action was taken in order to anticipate the possible action of the court in the above entitled cause.

Further affiant saith not.

H. WHITESIDE.

Subscribed and sworn to before me, this 9 day of April, 1906.

[SEAL.] J. H. NOBLE,
Notary Public.

58 Com. Ex. May 16th, 1906.

Endorsed: No. 1108. Circuit Court United States, District of Kansas, Second Division. Water, Light & Gas Co., *v.* City of Hutchinson, *et al.* Affidavit H. Whiteside in support application for injunction. Filed Apr. 11, 1906. Geo. F. Sharitt, Clerk, By J. F. Shearman, D. C.

59 In the Circuit Court of the United States, District of Kansas, Second Division.

No. 1108.

THE WATER, LIGHT & GAS CO., Complainant,

vs.

THE CITY OF HUTCHINSON, J. P. HARSHA, Mayor; J. E. HOSTUTLER, L. A. BEEBE, M. I. HULTS, G. W. OSWALD, F. G. DELANO, JOHN BLAIR, W. E. LONG, W. S. THOMPSON, C. HOWARD, F. MCDERMED, C. O'NEAL, and C. I. PARKS, Councilmen, and S. F. JOHNSON, City Clerk of said City of Hutchinson, and The Peoples' Water, Light & Power Co., of Hutchinson, a Corporation, Defendants.

Journal Entry of Orders, Decrees, and Exceptions.

April 11th, 1906, at regular term of the above Court, the Honorable John C. Pollock, sitting as judge; the complainant appearing by H. Whiteside, Fairchild & Lewis and Frank Doster, and the defendants appearing by C. M. Williams and A. C. Malloy their attorneys, the following proceedings were had, to-wit:

The petition of plaintiff to file a supplemental bill was presented and on due notice the leave was granted to file the said bill and it was then and there filed instanter. And it appearing that the defendants had filed a demurrer to the original bill, it was in open court stipulated that the said demurrer of defendants should extend to and apply to the supplemental as well as original bill. Said stipulation was approved by the Court.

Whereupon, the complainant presented, on due notice, its application for a temporary order of injunction to restrain the defendants from executing and attempting to carry out certain contracts and franchises set out in the bills of complaint. The application for injunction was supported by the bills of complaint as *an* affidavits, and also by affidavit of H. Whiteside, Esq., after argument of counsel and due consideration, the court doth deny on merit the application of plaintiff for a temporary order of injunction, to which ruling of the court, the complainant then and there excepted, and its exception was allowed.

60 The defendants then presented their demurrer to the bill of complaint and the supplemental bill for want of equity. After argument of counsel and due consideration of the court, the said demurrer of defendants was by the Court sustained, to which order of ruling of the court, the complainant did then and there except, and its exception was allowed. Thereupon the complainant

announced that it would not further amend its bills but stand on the bill of complaint and the supplemental bill. Whereupon, the defendants moved the court to dismiss the action of complainant and adjudge all costs of suit against complainant, in amount $——, said motion was by the court sustained; to which order, the complainant did then and there except and its exceptions were allowed. Thereupon the complainant, in open court and in the presence of counsel for defendants, announced that it would appeal from the judgment and orders of the court and asked that an order of restraint pending appeal be granted, offering to give bond in such sum as the court would fix. Application for restraint was denied on merit & Pl'ff excepted, and its exception was allowed, and thereupon the Pl't'ff did then and there file its assignment of errors and petition for appeal to the Supreme Court of the United States. The said assignments were approved and said appeal was then and there by the court allowed. A supersedeas bond was fixed at $500.00 and the complainant presenting a bond in that sum the same to act also as a cost bond; it was by the court approved, and it is ordered that the papers proceedings and entries in the cause duly certified may be transmitted to the Supreme Court of the United States, that it may review the orders and judgments herein. This order is made upon the strength of the former decision of this court in case No. 1101 between same parties and involving same subject matters, and for certainty and explanation the clerk is ordered to file in this cause a copy of the opinion and of the final decree filed in cause No. 1101.

61 Witness my hand.

JOHN C. POLLOCK, *Judge.*

Endorsed: No. 1108. Circuit Court United States, District of Kansas, Second Division. Water, Light & Gas Co., *v.* City of Hutchinson, *et al.* Decree. Filed Apr. 11, 1906. Geo. F. Sharitt, Clerk, By J. F. Shearman, D. C.

62 In the Circuit Court of the United States, District of Kansas, Second Division.

No. 1101. Equity.

THE WATER, LIGHT & GAS CO., a Corporation, Complainant,
v.
THE CITY OF HUTCHINSON ET AL., Defendants.

Memoranda of Decision on Demurrer to Amended Bill of Complaint.

As shown by the bill of complaint presented, defendant, the city of Hutchinson, a city of the second class under the laws of this state, by ordinance number 402 of that city, duly passed and approved March 5, 1897, and thereafter duly published, upon sufficient consideration entered into a contract with the Hutchinson Water, Light

and Power Company, a domestic corporation of this state, to supply said city and its inhabitants with water and light for a period of twenty years. Said contract, as shown from the terms of the ordinance, was a compromise and adjustment of rights arising between the parties under the terms of prior contracts theretofore entered into and then existing. The preamble to and so much of said ordinance number 402 as is deemed material to the consideration of the controversy now arising for decision, reads as follows:

"An ordinance to provide for a system of water works, electric light works and gas works, and supply of water, electric current and gas to the city of Hutchinson and the inhabitants thereof.

"Whereas, The Hutchinson Water, Light and Power Company is the owner of certain exclusive franchises and contracts with the city of Hutchinson, under which and in accordance with which the said company has expended large sums of money in con-
63 structing and building water works, electric light works and gas works, and in building up the business of said works, which are now in successful operation in supplying the city of Hutchinson and the inhabitants thereof with water, electric current and gas for all purposes for which water, electric current and gas is used; and

"Whereas, The city of Hutchinson is desirous of modifying and changing said franchise and contracts to the advantage of said city of Hutchinson without cancelling or abridging any of the rights or privileges vested in said company by reason of its labor and investments under said franchises and contracts other than the modifications hereinafter specified.

"Therefore, In consideration of the surrender of all the existing contracts and franchises of said company with the city of Hutchinson, excepting as hereinafter specified,

"Be it ordained by the mayor and council of the City of Hutchinson, Kansas:

"SECTION 1. That there is hereby given and granted to the Hutchinson Water, Light and Power Company, of Hutchinson, Kansas, its successors or assigns, the exclusive right and privileges for the term of twenty years from the date of the passage and approval of this ordinance of supplying the city of Hutchinson, Reno county, Kansas, and the inhabitants thereof, by a system of works with water for the prevention and extinguishment of fires and for all other purposes for which water may be used, (said water works to be the Holly system); with electric current for electric light and power, and for all other purposes for which electric current may be used, except power for the operation of street railways, which exception shall not prevent said Water, Light and Power Company from furnishing electric currents to street railways for any and all purposes; and with gas for lighting, heating and for fuel, and for all other purposes for which gas may be used, in accordance with the terms and conditions set forth in this ordinance.

"SECTION 2. That said Hutchinson Water, Light and Power Co., its successors or assigns, is hereby authorized to maintain, extend

and operate said works in or adjacent to the city of Hutchinson, to receive, take store, purify, conduct and distribute said water, electric current and gas through said city, to construct and extend aqueducts, mains, pipes and erect poles and wires through all the streets, alleys, lanes and public grounds and to cross any stream or bridge in said city, to erect and maintain all engines machinery and other appliances necessary for conducting any of said works, and for supplying said city and the inhabitants thereof with water, electric current and gas for the purposes herein mentioned, and for such purposes the said Hutchinson Water, Light and Power Company, its successors or assigns, shall have the right, and is hereby authorized to use the streets, alleys, avenues, lanes and public grounds in or adjacent to said city, and shall have the right to take up any pavements or sidewalks, and make such excavations therein as may be necessary to lay, repair and maintain aqueducts, mains and pipes below the surface of the ground for conveying and distributing the water and gas, and for erecting poles for electric wires as aforesaid;

"SECTION 4. The said city of Hutchinson hereby agrees to rent, and does rent for fire protection, the one hundred and eighty-five (185) fire hydrants now located on the mains of the said water works from the Hutchinson Water, Light and Power Company, its successors or assigns, for the full term of this contract, and the said city of Hutchinson will pay for the use of said one hundred and eighty-five (185) hydrants an annual rent of $6,000, payable semi-annually on the first days of May and November of each year, less $1,000 per year rebate for two years from the passage of this ordinance, payments to be made as hereinafter specified. For all hydrants located on extensions hereafter ordered by the city council, as specified in section 3 of this ordinance the city of Hutchinson agrees to pay thirty-six dollars ($36.00) per annum for each hydrant so located, payments to be made as hereinafter specified. The said Hutchinson Water, Light and Power Company shall furnish water for sprinkling the streets of the city of Hutchinson at the rate of $12.50 per month for each wagon or sprinkler used in sprinkling said streets for one year from and after the date of the passage and approval of this ordinance, and for the next succeeding year, or second year after the passage and approval of this ordinance, the said Hutchinson Water, Light and Power Company shall furnish water for such street sprinkling purpose at the rate of $15.00 per month for each wagon or sprinkler used in sprinkling said streets.

64

"SECTION 8. The city of Hutchinson shall have the right to purchase the works, property and business created, acquired, constructed and contemplated under this contract at any time after the expiration of ten years from the adoption of this ordinance, upon giving one year's notice to the owners of said property and upon paying to said owners a fair value for the same as may be mutually agreed, or fixed by a court of competent jurisdiction. Said one year's notice may be given at any time after the expiration of nine years from the date of the passage and approval of this ordinance.

"SECTION 13. The city of Hutchinson hereby agrees that it will

pass all necessary ordinances for the protection of the property of the said water works, electric light works and gas works; to prevent the contamination of the water supply; to prevent the waste of water from the hydrants, mains and pipes; to prevent all interference with its poles and wires, and that it will upon request of the said Hutchinson Water, Light & Power Company, its successors or assigns, to proceed without delay to exercise its rights under the statutes of the state of Kansas, in the matter of the condemnation of any lot, parcel or piece of ground, or of water, or water privileges that may be necessary to the proper and convenient construction, maintenance and operation of the system of water, gas and electric light works contemplated in this ordinance.

"Provided, That the said Hutchinson Water, Light and Power Company, its successors or assigns, pay all costs and expense incident thereto, including the cost of all property so condemned, and,

"Provided, farther, That the right to free and exclusive control of all property so condemned shall rest and remain in the said Hutchinson Water, Light and Power Company, its successors or assigns.

"SECTION 14. If the said Hutchinson Water, Light and Power Company, its successors or assigns, shall refuse to operate the water system contemplated in this ordinance at any time, that part of this franchise relating to the water system shall be forfeited, unless such failure to operate is unavoidable or due to accident.

"SECTION 15. Nothing in this ordinance shall prevent any person or company from manufacturing gas, electricity or any other material for his own or their own use for light or fuel, but in no case shall such person supply others with gas or electric current for any purpose."

65 Thereafter, complainant in this suit, a corporation of New Jersey, by purchase became and now is the lawful successor in right of all the property, franchises and rights of the domestic contracting company. On the 15th day of December, 1905, the defendant city of Hutchinson duly passed an ordinance number 651 of the city, contracting with and granting unto defendants Emerson Carey, K. E. Sentney, C. M. Williams, C. H. McBurney, A. W. Smith and J. S. George, their successors and assigns, certain rights and privileges of constructing and operating a line of street railway in said city and of furnishing said city and its inhabitants with electric light and gas for light, power and heating purposes. So much of said ordinance as is deemed material here reads as follows:

"An ordinance granting permission and authority to Emerson Carey, K. E. Santney, C. M. Williams, C. H. McBurney, A. W. Smith and J. S. George, their successors or assigns, to construct and operate a street railway in and along the streets and avenues of the city of Hutchinson, Reno county, Kansas, and to construct, operate and maintain an electric plant for the purpose of furnishing electric current for electric lights and power for all other purposes for which electric current may be used, and to construct, operate and maintain a gas plant for heating, lighting and fuel and for all other purposes for which gas may be used and prescribing certain regulations and relations thereto.

"Be it ordained by the Mayor and Councilmen of the City of Hutchinson, Kansas:

"SECTION 1. That consent, permission and authority are hereby given and granted to Emerson Carey, K. E. Sentney, C. M. Williams, C. H. McBurney, A. W. Smith and J. S. George, their successors or assigns, to construct, run and operate for a period of fifty years from and after the publication of this ordinance, a single or double track street railway, with all necessary sidetracks turnouts, switches and curves in and along the streets and avenues mentioned in section 12 of this ordinance and upon such other streets and avenues of said city for which the city council may hereafter grant permission, or where the owners of a majority of the front footage between the terminal points of the tracks upon such streets and ayenues shall consent in writing to this council to the construction and operation of a street railway thereon and to keep, maintain and operate thereon street railway cars and carriages in the manner and in accordance with the conditions and provisions hereinafter set forth.

"SEC. 21. There is hereby given and granted to the said Emerson Carey, K. E. Sentney, C. M. Williams, C. H. McBurney, A. W. Smith and J. S. George in connection with the privileges and rights conferred in the above and foregoing sections, the further right and privilege for the term of twenty years from the date of the passage and approval of this ordinance of supplying the city of Hutchinson, Reno county, and the inhabitants of said city and county with electric current for electric light and power and for all other purposes for which electric current may be used and for such purpose said grantees are here authorized and permitted to erect poles and wires through all the streets, alleys, lanes and public grounds and 66 to cross any stream or bridge in said city to erect and maintain all engines, machinery and other appliances necessary for the conducting of said work and for the supplying of said city, said Reno county and the inhabitants of said city and county with electric light and power.

"SEC. 22. The said grantees herein, their successors or assigns shall not at any time use the poles, wire and other appliances provided for in this ordinance in such a manner as to hinder or obstruct the commerce or trade of the city of Hutchinson, nor obstruct the proper use of the streets, alleys, lanes, avenues public grounds or other public places excepting as may be necessary temporarily to

make repairs, or extensions or improvements to its property and works.

"SEC. 23. That in addition to the rights and privileges heretofore granted, there is granted to said Emerson Carey, K. E. Sentney, C. M. Williams, C. H. McBurney, A. W. Smith and J. S. George, their successors and assigns, the further right and privilege for the term of twenty years from the date of the passage and approving of this ordinance of supplying the city of Hutchinson, Reno county, Kansas, and the inhabitants thereof with gas, either manufactured or natural and for such purpose shall have the right and privilege to construct and maintain mains, pipes and other conduits in the streets and alleys of said city.

"SEC. 28. The City of Hutchinson hereby agrees that it will pass all necessary ordinances for the protection of the property of the said grantees herein, their successors and assigns of their street railway and its machinery, electric works and gas works, and to prevent interference with the poles and wires, or the convenient construction, maintenance and operation of the same."

This suit was brought to enjoin and restrain the defendant city, its mayor and council, and the persons named contracting with the defendant city by the terms of ordinance number 651, from in any way proceeding under the terms of said ordinance toward the doing of any public service which complainant might do under the terms of ordinance number 402, upon the ground that complainant has the exclusive right for the period of time mentioned therein, twenty years, which time has not expired, to furnish such public service to the city and inhabitants thereof. The prayer of the bill reads:

"That a writ of injunction be issued commanding the defendants and all persons claiming to act under their authority and direction to refrain and desist from doing any acts or exercising any pretenses of right to act under the aforesaid ordinance number 651 granted to defendants as aforesaid which will in any wise affect the exclusive rights of your orator to furnish the said city and its inhabitants with electric or gas light for lighting and heating purposes or power except for street cars and electric railways, and also from making or proceeding to make any contract for furnishing light or gas to said city and its inhabitants until the expiration of the aforesaid franchises and contracts of your orator with said city."

Defendants have appeared to this bill and demur for want of equity.

67 The questions arising for determination are: (1) Did the city, by ordinance number 402, grant or attempt to grant unto the corporation therein named the exclusive right for the period of time therein named of furnishing the city and its inhabitants with electric light and gas for heating, light and fuel, such period of time not having expired: (2) if so, did the city possess the power inherent or under the law of its creation to make an *exclusive* contract, binding itself and inhabitants to receive and pay for water, light, heat and power from the corporation there con-

tracted with for the period of twenty years to the exclusion of all others?

If these questions are answered in the affirmative, then it is clear the demurrer must be overruled and complainant may maintain this suit to protect its franchises and contract rights from violation at the hands of the defendants. Jersey City Gas. Co. *v.* Dwight, 29 N. J. Eq. 242; City of Newport *v.* Newport Light Co. 84 Ky. 166.

While the exclusive right of complainant to furnish the defendant city with water under its franchise is not here challenged, and while complainant by the terms of ordinance number 402 does not obligate itself to the city to furnish light, heat or power, yet, assuming for the purpose of decision the contract made by ordinance number 402 between the defendant city and complainant as successor of the Hutchinson Water, Light and Power Company, is in terms exclusive, and was intended to be so by the city at the time it was made, the important and principal inquiry still remains, did the city at the time the ordinance was passed possess the power to make a contract binding and exclusive of all others for the period of twenty years? If so, it follows, of necessity, the demurrer must be overruled. If not, it should be sustained, for the sole purpose of this suit, as has been seen, is to nullify the action of the city in the making of the subsequent contract upon the one ground alone of the exclusive character of the former grant.

In the light of authority it must be conceded the power to make the excluded contract contended for by complainant resides
68 in the state and may be delegated by it to municipal agent, such as the defendant city, and when delegated the city becomes possessed of the power by contract to exclude not only other persons and corporations thereafter desiring to contract with it for the performance of a public service for a given period of time, but also to obligate itself during such term not to undertake the performance of such public service, and such contract rights will receive protection from the courts under the federal constitution. Walla Walla *v.* Walla Walla Water Co., 172 U. S. 1.

It therefore becomes important in this inquiry to determine first of all, the precise power inherent in or conferred upon the defendant city to contract with the Hutchinson Light and Power Company.

The defendant city as a municipal corporation of this state is purely a creation of statutory law. Our constitution recognizes but does not confer any power upon cities of the state. Section 5, article 12, provides:

"Provision shall be made by general law for the organization of cities, towns and villages; and their power of taxation, assessment, borrowing money, contracting debts and loaning their credit, shall be so restricted as to prevent the abuse of such power."

As the full measure of power reserved by the state, unsurrendered to the general government upon its admission into the Union, remains in and can be exercised alone by the state, except as such

power has been by the legislature of the state delegated to its municipal corporations and other agents, as a necessary and inevitable sequence it must follow, there is no inherent power in the defendant city to make the contract claimed, Citizens' St. Railway *v.* Detroit Railway, 171 U. S. 48. And as the organic law of the state confers no power upon the cities of the state, but merely empowers the legislative branch of the state to organize cities under general laws and to restrict their powers, the power of the defendant city to make the exclusive contract claimed by complainant to exist must be found, if at all, either in the charter of the contracting company or in the provisions of the second class cities' act of this state, in force
69 at the time of the passage of the ordinance, for this act is the organic law of the city.

What was the measure of power conferred upon the corporation and the city, and how must the statutory law granting such power be construed by the courts. The contracting company having been created under the general incorporation laws of the state did have the power "To enter into any obligation or contract essential to the transaction of its ordinary affairs." Sec. 25, Chap. 23, Art. 3, Gen. Stat. 1901. While this grant of power might suffice to enable the company to enter into an exclusive contract with the city, it is not contended, and cannot be contended, it conferred any such power upon the city to so contract. Hence, the power claimed to have been conferred upon the city must be found, if it exists, in the organic law of the city, that is, in the second class cities' act, and such amendments thereto as were in force at the date of the making of the contract in question.

Looking now to this act we find the following statutory provisions bearing upon this question. Section 35 of the act provides the general powers of the mayor and council of such city, and reads as follows:

"The mayor and council of each city governed by this act shall have the care, management and control of the city, and its finances, and shall have power to enact, ordain, alter or repeal any and all ordinances not repugnant to the constitution and laws of this state, and such as it shall deem expedient for the good government of the city, the preservation of the peace and good order, the suppression of vice and immorality, the benefit of trade and commerce, and the health of the inhabitants thereof, and such other ordinances, rules and regulations as may be necessary to carry such power into effect."

Section 65 of the act provides:

"The council may provide for and regulate the lighting of the streets, and the erection of lamp posts, and the numbering of the buildings in the city, and the construction of sewers; and the counsel shall have power to make contracts with any person, company or association for such purposes, and give such person, company or association the privilege of furnishing light for the streets, lanes or alleys of said city for any length of time not exceeding twenty one years."

Section 83 of the act provides:

"That cities of the second class of the state of Kansas are hereby granted full power and authority, on behalf of said cities to purchase, procure, provide and contract for the construction of and construct water works, electric light and gas plants, for the purpose of supplying such cities and the inhabitants thereof with water, light and gas for domestic use and any and all other purposes."

Judge Dillon in his work on Municipal Corporations, 4th ed., section 89, says:

"It is a general and undisputed proposition of law that a municipal corporation possesses and can exercise the following powers, and no others: 1. Those granted in express words; 2. Those necessarily or fairly implied in or incident to the powers expressly granted; 3. Those essential to the declared objects and purposes of the corporation,—not simply convenient, but indispensable. Any fair reasonable doubt concerning the existence of the power is resolved by the courts against the corporation, and the power is denied. Of every municipal corporation the charter or statute by which it is created is its organic act. Neither the corporation nor its officers can do any act, or make any contract, or incur any liability, not authorized thereby, or by some legislative act applicable thereto. All acts beyond the scope of the powers granted are void."

In Minturn *v.* Larue *et al.*, 23 How. 435, Mr. Justice Nelson delivering the opinion of the court, says:

"It is a well settled rule of construction of grants by the legislature to corporations, whether public or private, that only such powers and rights can be exercised under them as are clearly comprehended within the words of the act or derived therefrom by necessary implication, regard being had to the objects of the grant. Any ambiguity or doubt arising out of the terms used by the legislature must be resolved in favor of the public."

Judge Jackson in Grand Rapids E. L. & P. Co. *v.* Grand Rapids E. E. L. & F. G. Co., 33 Fed., 659, says:

"To confer *exclusive* rights and privileges, either in the streets of a city or in the public highways, *necessarily involves the assertion and exercise of exclusive powers and control over the same.* Nothing short of the *whole sovereign power* of the state can confer *exclusive* rights and privileges in public streets, dedicated or acquired for *public* use, and which are held in *trust* for the *public at large.* This brings us directly up to the inquiry whether the legislature of Michigan has delegated to the city of Grand Rapids the state's sovereign power and control over the streets of that municipality. If the charter powers of the city have invested it or its common council with the *whole sovereign* power and exclusive control over the streets within its limits, it might lawfully confer upon the complainant the exclusive right of user, which the ordinance of 1880 undertook to grant. If, however, the city or its common council possessed no such exclusive power and control, then the grant which it attempted to make to complainant was *"ultra vires,"* and therefore void, so far

as it purports to confer exclusive privileges in or over the streets of the city."

Mr. Justice McKenna, delivering the opinion of the court in Citizens' St. Railway *v.* Detroit Railway, 171 U. S., 48, says:

"It is clear that the statute did not explicitly and directly
71 confer the power on the municipality to grant an exclusive privilege to occupy its streets for railway purposes. It is urged, however, that such power is to be inferred from the provision which requires the consent of the municipal authorities to the construction of a railway under such terms as they may prescribe, combined with the provisions of the constitution, which, if they do not confer a power independent of the legislature, strongly provide for and intend local government. The argument is strong, and all of its strength has been presented and is appreciated, but there exist considerations of countervailing and superior strength. That such power must be given in language explicit and express, or necessarily to be implied from other powers, is now firmly fixed. There were many reasons which urged to this—reasons which flow from the nature of the municipal trust—even from the nature of the legislative trust, and those which, without the clearest intention explicitly declared, insistently forbid that the future should be committed and bound by the conditions of the present time, and functions delegated for public purposes be paralyzed in their exercise by the existence of exclusive privileges. The rule and the reason for it are expressed in Minturn *v.* Laue, 23 How. 435; Wright *v.* Nagle, 101 U. S. 791; State *v.* Cincinnati Gas Light and Coke Co., 18 Ohio St. 262; Parkhurst *v.* Salem, 32 Pac. Rep. 304; Saginaw Gas Light Co. *v.* Saginaw, 28 Fed. Rep. 529, decided by Mr. Justice Brown of this court; Long *v.* Duluth, 51 N. W. Rep. 913. See also Grand Rapids Electric Light and Power Co. *v.* Grand Rapids &c. Co., 33 Fed. Rep. 659, opinion delivered by Mr. Justice Jackson at circuit. As bearing on the rule, see also Oregon Railway & Navigation Co. *v.* Oregonian Railway Co., 130 U. S. 1; Central Transportation Co. *v.* Pullman Palace Car Co., 139 U. S. 24.

"The power, therefore, must be granted in express words or necessarily to be implied. What does the latter mean? Mr. Justice Jackson, in Grand Rapids, &c. Power Co. *v.* Grand Rapids &c., *supra*, says: * * * "that municipal corporations possess and can exercise only such powers as are 'granted in *express words*, or those *necessarily* or *fairly* implied, *in or incident to the powers expressly* conferred, *or those essential to the declared objects and purposes of the corporation, not simply convenient, but indispensable.*'"

Mr. Justice Brewer, delivering the opinion of the court in Jackson County Horse R. Co. *v.* Interstate Rapid Transit Ry. Co., 24 Fed. 307, says:

"The precise question is, had the city of Kansas the power to grant for a term of years the exclusive right to occupy its streets with street railroads? That question must be answered in the negative. Let me in the outset formulate two or three unquestioned propositions: (1) The legislature has, as the general representative of the public, the power, subject to specific constitutional limitations, to

grant special privileges; (2) it may, with similar limitations, grant the like power to municipal corporations as to all matters of a purely municipal nature; but, (3) as the possession by one individual of a privilege not open to acquisition by others apparently conflicts with that equality of rights which is the underlying principle of social organization and popular government, he who claims such exclusive privilege must show clear warrant of title, if not also probable corresponding benefit to the public. Hence the familiar rule that charters, grants of franchises, privileges, etc., are to be construed in favor of the government. Doubts as to what is granted are resolved in favor of the grantor, or as often epigrammatically said, a doubt destroys a grant."

Judge Sanborn in the case of the Illinois Trust & Sav. Bank *v.* City of Arkansas City, 22 C. C. A., 179, says:

72 "The general rule is that the legislature alone has the power to make exclusive grants of this character, and that this authority does not vest in the municipality, unless it is expressly granted to it by its charter. It will be further conceded that, if a grant of a similar privilege in its streets, not exclusive, has been subsequently made by this city to another corporation, and that corporation was about to proceed to construct another system of water works in this city, neither the gas company nor the city itself could maintain a bill to enjoin such proceedings. Since it was beyond the power of the city to make the grant of the privilege exclusive, that portion of the grant would not sustain a bill to restrain the violation of its terms."

In the exercise of the sovereign reserved power possessed by the state under the constitution, state legislatures have in many cases granted exclusive rights, franchises and privileges, and such grants have been upheld and enforced as exclusive. New Orleans Gas Co. *v.* Louisiana Light Co. 115 U. S. 650; New Orleans Water-Works Co. *v.* River, *id.* 674; Louisville Gas Co. *v.* Citizens' Gas Co. *id.* 683; Tammany Water W'ks. *v.* N. O. Water W'ks., 120 U. S. 64. But it is quite clear from a consideration of the fundamental principles of government and an examination of the adjudicated cases, defendant city under our constitution possessed neither the inherent power to make the exclusive contract claimed by complainant, nor did the legislature of the state confer, or attempt; to confer upon it, such plenary power, under the statutory provisions quoted, from the organic law of the city. Before the contention of complainant in this suit to the exclusive right claimed may be upheld, it must appear the legislature of the state, in express terms, or by necessary and inevitable implication, delegated to defendant city such sovereign and plenary power as once exercised by it exhausted the power to further contract in that regard during the life of the grant. This, as has been seen, it did not do. There are cases in actual or apparent conflict with the view here expressed, notably, City of Newport *v.* The Newport Light Company *et al.*, 84 Ky. 166. This case, however, was reviewed by Judge Brown at the circuit in Saginaw Gas Light Co. *v.* City of Saginaw, 28 Fed. 529, and its reasoning disapproved.

It is in conflict with the very great weight of authority and its argument is inconclusive.

73 Again it is thought by solicitors for complainant in this suit the recent case of California Reduction Co. *v.* Sanitary Reduction Works, decided by the Supreme Court, Nov. 27, 1905, is authority for the position taken by complainant here. In that case the supervisors of the city of San Francisco by ordinance granted to one F. E. Sharon, his associates and assigns the exclusive right for a term of fifty years to handle and reduce the garbage and refuse of that city. This grant was upheld and defendants assuming to act under a subsequent grant made by the city were enjoined. From an examination of that case it is seen section 11 of article 11 of the constitution of that state provides:

"Any county, city, town or township may make and enforce within its limits all such local police, sanitary and other regulations as are not in conflict with general laws."

By virtue of this provision of the organic law of the state the full sovereign power with relation to the subject matter of the grant was delegated to the city of San Francisco to be exercised in such manner as in the judgment of the supervisors of the city might seem proper, except in so far as any attempt to exercise the power conferred might conflict with the general laws of the state. The holding was, the power exercised by the city in the making of the grant in question was not prohibited by the general laws of the state, hence, valid. To distinguish, there, the city possessed plenary power derived from the organic law of the state over the subject matter of the grant, except as its attempted exercise came in conflict with the general laws of the state. Here the organic law of the state confers no power upon the city, and the city can exercise no power not expressly or by necessary implication granted to it by the legislature.

This view of the controversy renders unnecessary a decision of the other question arising in the case, for it is apparent if the city had no power to grant the exclusive right claimed by complainant, such right if granted in terms would be void as to its exclusive feature, and would afford complainant no right to enjoin the further

74 exercise of the power conferred upon the city.

It follows, the demurrer must be sustained. It is so ordered.

JOHN C. POLLOCK, *Judge.*

Topeka, Jan'y 27th, 1906.

Endorsed: No. 1101. Opinion. Filed Jan'y 29, 1906. Geo. F. Sharitt, Clerk. By J. F. Shearman, D. C.

A true Copy.
Attest:
[SEAL.] GEO. F. SHARITT, *Clerk.*

Endorsed: No. 1108. Copy of Opinion in #1101. Filed May 7, 1906. Geo. F. Sharitt, Clerk.

75 In the Circuit Court of the United States, District of Kansas, Second Division.

THE WATER, LIGHT & GAS CO., of Hutchinson, Kansas, Plaintiff,
vs.
THE CITY OF HUTCHINSON ET AL., Defendants.

Journal Entry.

This cause coming on for hearing, on this the 15th day of March, 1906, the same being a regular day of the March 1906 term of the Circuit Court of the United States, District of Kansas, Second Division, the Honorable John C. Pollock, Judge of said Court, presiding. The plaintiff appeared by the Honorable H. Whiteside, Frank Doster and Fairchild & Lewis, its Attorneys, and the defendants appeared by the Honorable A. C. Malloy and Prigg & Williams, their Attorneys. Whereupon said cause came on to be heard upon the amended bill of the plaintiff, and its application for a temporary order of injunction thereunder, and the demurrer of the defendants to the amended bill for want of equity. After due notice being given in the premises and the argument of counsel, the Court doth sustain the demurrer filed by the defendants to the amended bill for want of equity in said bill, to which judgment complainant then and there excepted and its exception is allowed, and as a consequence of the Court holding that the demurrer to the said amended bill is good, the application of the plaintiff for a temporary order of injunction is by the Court denied, to which ruling of the Court, the plaintiff did then and there except and its exceptions was allowed. Thereupon the plaintiff moved the Court that it issue and allow a temporary order of restraint against the defendant, from doing the acts complained of in the bill, the execution of which is al-
76 leged to be threatened, pending the appeal of the defendants to the Supreme Court of the United States. The said plaintiff offering to make bond to secure the defendants against damage, with approved security in such sum as the Court would fix. After the arguments of counsel upon the merits of said motion, the same is by the Court overruled, to which the plaintiff then and there excepted and its exceptions was allowed. The plaintiff did not ask to amend its bill, but stood upon the allegations and averments therein Whereupon the defendants moved that the court dismiss the bill and action of plaintiff, and tax the cost of action to said plaintiff, which said motion was by the Court sustained, and the said bill and action together with the application for injunction, are by the Court finally dismissed and the costs of suit, in amount $—— was attached, to all of which the plaintiff excepted, and its exceptions allowed.

JOHN C. POLLOCK,
Judge Circuit Court.

Endorsed: No. 1101, Equity. Decree. Filed M'ch 15, 1906. Geo. F. Sharitt, Clerk. By J. F. Shearman, D. C.

UNITED STATES OF AMERICA,
District of Kansas, Second Division, ss:

I, Geo. F. Sharitt, Clerk of the Circuit Court of the United States for the District of Kansas, Second Division, do hereby certify that the above and foregoing is a full, true and correct copy of the Decree in case No. 1101, The Water, Light & Gas Co. *versus* the City of Hutchinson, et al., as the same now remains on file and of record in my office.

77 In testimony whereof, I have hereunto set my hand and affixed the seal of said court at my office in Wichita, in said district and division, this 7th day of May, A. D. 1906.

[SEAL.] GEO. F. SHARITT, *Clerk.*

Endorsed: No. 1108. Copy of Decree in No. 1101. Filed May 7, 1906. Geo. F. Sharitt, Clerk, By J. F. Shearman, D. C.

78 In the Circuit Court of the United States, District of Kansas, Second Division.

No. 1108.

THE WATER, LIGHT & GAS COMPANY, Complainant,
vs.
THE CITY OF HUTCHINSON, J. P. HARSHA, Mayor; J. E. HOSTUTLER, L. A. BEEBE, M. I. HULTS, G. W. OSWALD, F. G. DELANO, JOHN BLAIR, W. E. LONG, W. S. THOMPSON, C. HOWARD, F. MCDERMED, C. O'NEAL, and C. I. PARKS, Councilmen, and S. F. JOHNSON, City Clerk or said City of Hutchinson, and THE PEOPLES WATER, LIGHT & POWER CO., of Hutchinson, a Corporation, Defendants.

Assignment of Errors.

Comes now Complainant in the above cause and files the following Assignment of Errors, upon which it will rely in its appeal made from the decrees and orders made by this Honorable Court on the 11th day of March, 1906, in the above entitled action.

1.

For sustaining the Demurrer of defendants for want of equity to the amended bill of complaint, and the supplemental bill of complaint.

2.

For refusing the application of complainant for temporary order of injunction.

3.

For refusing complainant a permanent injunction against defendants as prayed for.

4.

For refusing complainant an order for restraint pending its appeal to the Supreme Court of the United States.

5.

For holding that the contract and franchises of complainant set out in its bill of complaint were not entitled to protection from the impairment threatened by defendants under the Constitution of the United States.

79

6.

For holding in effect that it was not inequitable under the Constitution of the United States and the law of the land, for the defendants to do and perform the acts sought to be restrained by complainant and set out as being threatened therein.

7.

Dismissing Complainant's Bill of Complaint finally and taxing the costs of suit to Complainant.

H. WHITESIDE,
FAIRCHILD & LEWIS,
F. DOSTER,
Solicitors for Complainant.

Approved April 9, 1906.

Endorsed: No. 1108. Circuit Court of United States, District of Kansas, Second Division. Water, Light & Gas Co., *v.* City of Hutchinson, *et al.* Assignment of Errors. Filed Apr. 11, 1906. Geo. F. Sharitt, Clerk, By J. F. Shearman, D. C. H. Whiteside, H. S. Lewis, Waggener, Doster & Orr, for Complainant.

80

Supersedeas Bond.

In the Circuit Court of the United States, District of Kansas, Second Division.

THE WATER, LIGHT & GAS CO., of Hutchinson, Kansas, Plaintiff,
vs.
CITY OF HUTCHINSON ET AL., Defendants.

Know all men by these presents: That we, The Water, Light & Gas Company a corporation as principal and American Surety Company of New York, N. Y., as surety, are held and firmly bound unto the above named defendants in the sum of $500, to be paid to the said defendants, for the payment of which well and truly to be made, we bind ourselves and each of us, our and each of our heirs, executors, and administrators, jointly and severally firmly by these presents. Sealed with our seal and dated the 9 day of April, in the year of our Lord nineteen hundred and six. Whereas the above named appellant has prosecuted an appeal to the Supreme Court of the United States,

to reverse the decree and orders rendered in the above entitled suit, by the Judge of the above Circuit Court of the United States, District of Kansas, Second Division.

Now therefore the condition of this obligation is such that if the above named Water, Light & Gas Company shall prosecute said appeal to effect and answer all damages and costs, if he fail to make said appeal good, then this obligation shall be void, otherwise the same shall be and remain in full force and effect.

THE WATER, LIGHT & GAS CO., *Principal,*
By H. WHITESIDE, *Its Att'y.*
AMERICAN SURETY COMPANY OF NEW YORK,
By HOWARD S. LEWIS, *Res. Vice-Pres.*
Attest: By L. E. FONTRON, *Res. Asst. Sec'y.*

81 [SEAL.]

Sealed and delivered, and taken and acknowledged, this 11th day of April, 1906, before me X ——— ———.

Approved by
JOHN C. POLLOCK,
Circuit Judge.

Endorsed: # 1108. In Equity. The Water, Light & Gas Co., *vs.* The city of Hutchinson *et al.* Supersedeas bond. Filed Apr. 11, 1906. Geo. F. Sharitt, Clerk. By J. F. Shearman, D. C.

82 In the Circuit Court of the United States, District of Kansas, Second Division.

No. 1108.

THE WATER, LIGHT & GAS COMPANY, Complainant,
vs.
THE CITY OF HUTCHINSON ET AL., Defendants.

Petition for Allowance of Appeal with Supersedeas.

The above named Complainant considers itself aggrieved by the orders and decrees made and entered in the above entitled cause on the 11th day of April, 1906, for the reasons specified in the Assignment of Errors filed herein, does hereby appeal from the said orders and decrees to the Supreme Court of the United States and prays that this appeal be allowed and that a transcript of the record papers and proceedings upon said orders and decrees were made duly authenticated may be sent to the Supreme Court of the United States.

H. WHITESIDE,
FAIRCHILD & LEWIS, AND
F. DOSTER,
Solicitors for Complainant.

Endorsed: In C. C. U. S. Dist. Kans., 2nd Div. In Equity 1108. Pet. for Appeal. The Water, Light & Gas Co. *vs.* The City of Hutchinson *et al.* Filed Apr. 11, 1906. Geo. F. Sharitt, Clerk, By J. F. Shearman, D. C. H. Whiteside, Fairchild & Lewis & F. Doster, Solicitor Pl'ff.

83 In the Circuit Court of the United States, District of Kansas, Second Division.

THE WATER, LIGHT & GAS CO., Complainant,

vs.

J. P. HARSHA, Mayor; J. E. HOSTUTLER, L. A. BEEBE, M. I. HULTS, C. W. OSWALD, F. G. DELANO, JOHN BLAIR, W. E. LONG, W. S. THOMPSON, C. HOWARD, F. M. MCDERMED, C. O'NEAL, C. I. PARKS, Councilmen, and S. F. JOHNSON, City Clerk, and THE PEOPLES' WATER, LIGHT & POWER CO., Defendants.

Order Allowing Appeal.

On petition of complainant in open court with due notice to defendants in the presence of their Counsel, it is ordered that an appeal to the Supreme Court of the United States be allowed Complainant from the orders and decrees in said cause made April 9, 1906, and entered herein, and that a certified transcript of the record, exhibits, stipulations and all proceedings herein be forthwith transmitted to the Supreme Court of the United States.

It is further — that the bond on appeal be fixed at $500.00 and that the same act as a supersedeas bond, and also as a bond for costs and damages on appeal.

Dated April 9, 1906.

JOHN C. POLLOCK,
Circuit Judge.

Endorsed: In C. C. U. S. Dist. Kansas, 2nd Div. In Equity No. 1108. Order allowing appeal. The Water, Light & Gas Co. *vs.* The City of Hutchinson *et al.* Filed Apr. 11, 1906. Geo. F. Sharitt, Clerk. By J. F. Shearman, D. C.

84 UNITED STATES OF AMERICA,
District of Kansas, Second Division, ss:

I, Geo. F. Sharitt, Clerk of the Circuit Court of the United States of America, for the District of Kansas, do hereby certify that the foregoing transcript contains full, true and complete copies of all the pleadings, proceedings, writs, records and record entries, in a certain cause in the Second Division of said Court, wherein The Water, Light & Gas Company, a Corporation, is complainant, and The City of Hutchinson, and others are defendants, as full, true and complete as the originals of the same now remain on file and of record in my office.

I further certify that the original Citation in said cause is hereto attached and herewith returned.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court, at my office in Wichita, in said District and Division, this 9th day of June, A. D. 1906.

[Seal of the Circuit Court of the United States, Second Division, District of Kansas.]

GEO. F. SHARITT, *Clerk,*
By J. F. SHEARMAN,
Deputy Clerk.

Endorsed on cover: File No. 20,289. Kansas C. C. U. S. Term No. 54. The Water, Light & Gas Company of Hutchinson, Kansas, appellant, *vs.* The City of Hutchinson *et al.* Filed June 18th, 1906. File No. 20,289.

IN THE

SUPREME COU

OF THE

UNITED STATES.

The Water, Light & Gas Company
Appellant.

vs.

The City of Hutchinson,
Kansas, et al.
Appellees.

No. 58.

The Water, Light & Gas Company
Appellant.

vs.

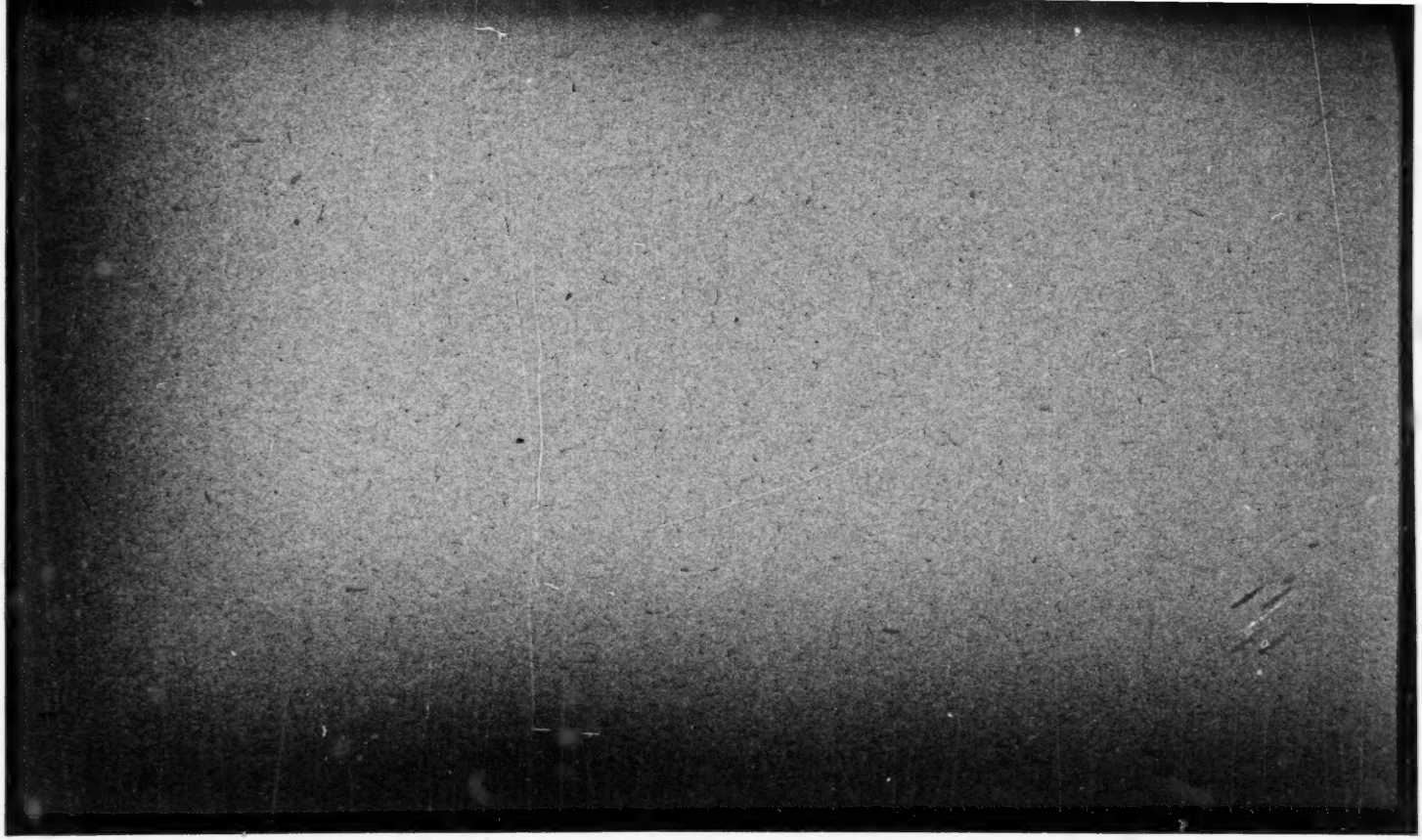
The City of Hutchinson,
Kansas, et al.
Appellees.

No. 59.

Brief and Argument of Appellant.

JOHN F. DILLON,
HARRY HUBBARD,
FRANK DOSTER,
HOUSTON WHITESIDE,
HOWARD S. LEWIS,
Solicitors for Appellant.

Daily Independent, Steam Printers, Kansas City, Mo.



INDEX.

	Page.
Points for Appellant	3
Statement of the Case	5
Prayer of the Bills	15
The Ordinance:	
The Preamble	16
Section one	17
Section two	18
Section eight	18
Section fifteen	19
Specification of errors	20
Argument commences	21
The furnishing of light to a City and its inhabitants an exercise of the POLICE POWER, authorities	22
Statutes delegating power to furnish light, liberally construed in KANSAS, authorities	25
State vs. City of Topeka 68 Kas. 177	27
The rule of Statutory Construction in HARTWELL case	29
The Statutes of Kansas authorizing Ordinance 402.	
Section 759	31
Section 787	31
Section 811	32
Section 816	33
Section 817	33
Section 824	34
Section 1401	34
Section 1402	34

Comparison of Statutory authority in Mississippi and Kansas 37
Vicksburg vs. Vicksburg Water Works Co. 202 U. S. 453 37
Omaha Water Works vs. City of Omaha 147 Fed. 1 40
California Reduction Co. vs. Sanitary Reduction Co. 199 U. S. 306 41
The City had the power to grant an exclusive right to light the streets and buildings under the "General Welfare" clauses 43
City of Newport vs. Newport Light Co. 84 Ky. 166 46
The power to furnish light implies the obligation to make the necessary contracts 47
Distinction between MONOPOLY and a grant of a PRIVILEGE not of common right 50
Special features and equities in this case 56
Louisville Gas Co. vs. Citizen's Gas Co., 115 U. S. 683 59
Columbus Water-Works Co. vs. The City of Columbus, 48 Kans., 99 62

IN THE

SUPREME COURT

OF THE

UNITED STATES.

The Water, Light & Gas Company
Appellant.

vs.

The City of Hutchinson,
Kansas, et al.
Appellees.

No. 53.

The Water, Light & Gas Company
Appellant.

vs.

The City of Hutchinson,
Kansas, et al.
Appellees.

No. 54.

The only ultimate question in these cases is the validity of Ordinance No. 402. Its validity is attacked by appellees (the present officers of the city, and its recent grantees) on the ground that said Ordinance 402 is *ultra vires*, so far as it under-

took to make or authorize an exclusive contract for electric light and gas for the period of twenty years, and to grant for the purpose of carrying out the said contract and supplying the city, and its inhabitants with water, electricity and gas, as mentioned in the ordinance, the use of the streets and public places for the term of twenty years.

The appellant maintains that said Ordinance is not *ultra vires*, but reasonable and valid, and within the clear lawful competency of the city to enact. In support of this view the appellants in the course of this ARGUMENT will urge the propositions or points below stated. As down to this time the city has not taken any hostile action in respect to the *Water-rights* of the appellant, under said Ordinance 402, but only in respect of their electric and gas rights, this argument will be limited accordingly.

POINTS FOR APPELLANT.

FIRST. The furnishing of light to a city and its inhabitants whether under direct legislative authority, or by the city itself, or under contract with the city, is an exercise of the police power.

SECOND. Statutes delegating to municipalities the police power to furnish light or to procure it to be furnished are to be liberally construed to effectuate their object, and are liberally construed in Kansas.

THIRD. Under the statutes of Kansas authorizing cities of the second class "to provide for and regulate the lighting of the streets, and to make contracts with any person, company or association for such purpose, and to give such person, company or association the privilege of furnishing light for the streets of said city for any length of time not exceeding 21 years," power was given to make an exclusive contract, such as Ordinance 402, for a limited and reasonable period to light the streets.

FOURTH. Under the general power "to make all contracts and to do all other acts in relation to the property and affairs of the city necessary to the exercise of its corporate or administrative powers," and under the general welfare clauses and cognate provisions of the statutes of Kansas governing cities of the second class, such cities have power to make an exclusive contract for 20 years, such as Ordinance 402, subject to police control, to furnish the city and its inhabitants with light.

FIFTH. When a municipal corporation, vested as an agency of government with local rule and with the power to light its streets and furnish light to its inhabitants, delegates the discharge of the work to another, the right to use the streets for such purpose is a mere incident to the performance of the services and not a primary or independent franchise; hence, in such case the right to use the streets, exclusively or otherwise, is to be measured by the terms of the contract for the performance of the main delegated duty or power, and Ordinance 402 so provides.

SIXTH. The grant by the city of an exclusive right for 20 years to furnish light to the city and its inhabitants made to a public lighting company, as in Ordinance 402 without any surrender of the power to regulate rates and otherwise exercise police control is not the grant of a monopoly.

SEVENTH. There are special features in these cases and special equities possessed by appellant which show that its contract with the city is in all respects just, fair and reasonable and ought to be upheld and enforced.

STATEMENT OF THE CASE.

These are suits in equity brought by the appellant, as complainant, against the appellees, as defendants, in the Circuit Court of the United States for the District of Kansas, to restrain the principal defendant, the City of Hutchinson, Kansas, from carrying into execution certain municipal action by it, which, if carried into effect, would constitute an impairment of a contract theretofore entered into on its part with appellant.

The jurisdiction of the Circuit Court is two fold:

First. By reason of diverse citizenship of the parties. Second. By reason of the subject matter of the suits, namely, to protect complainant's franchises and contract rights from impairment and deprivation by the defendants, in violation of the Constitution of the United States.

The threatened action subversive of appellant's contract rights consists of ordinances granting to certain parties the privilege of operating electric light and gas works in the city contrary to the conditions of its previous agreement with appellant, under which the latter was granted the right to operate electric light and gas works for a

limited period, not yet expired, free from the competition of rival concerns.

In case No. 53 on this court's docket, the city ordinance claimed to constitute an impairment of appellant's previous contract was granted to Emerson Carey, K. E. Sentney, C. M. Williams, C. H. McBurney, A. W. Smith and J. S. George. (Rec. in No. 53 p. 9.)

Subsequently these persons and others organized themselves into a corporation, called the Peoples Water, Light & Power Company, which procured from the city an ordinance of a like character to that granted to the individuals named; whereupon another bill was filed of the same tenor and purport as the previous one, making the Peoples Water, Light & Power Co. a defendant instead of the named individuals. The appeal in that case is No. 54 on the docket of this court.

The bills in the two cases are identical in substance. The one in No. 54 elaborates somewhat on the averments of the previous bill, but there is no material difference in substantive allegation. Summarized the bills are as follows:

First. That complainant is a corporation organized under the laws of New Jersey, and has been authorized to do business in Kansas; that the city of Hutchinson is a city of the second class under the laws of Kansas; that certain named individual defendants are its municipal officers; that in No. 53 certain other individual defendants had

procured the municipal action complained of, and that in the other case, No. 54, the Peoples Water, Light & Power Co., a corporation, had procured like action.

Second. That in 1885 the city granted to the Holly Manufacturing Company, a corporation, its successors and assigns, an exclusive franchise and contract right for 20 years to build and operate *water works* in the city, the said company agreeing to furnish water to the city at certain rates per hydrant per annum; that such company erected and operated water works in compliance with its agreement and until the subsequent assignment of its rights.

Third. That in 1885 the city granted to the Interstate Gas Company, a corporation, its successors and assigns, a franchise and contract right to erect and maintain *gas works* for the period of 21 years; that it erected a gas plant and operated it until the subsequent assignment of its rights.

Fourth. That in 1886 the city granted to Drake and Orton, their successors and assigns, a franchise and contract right to construct and operate an *electric light plant* to furnish the city and its inhabitants with electric light and power for 20 years; that they erected the light plant and operated it until the subsequent assignment of their rights.

Fifth. That all the rights vested in the two companies named, and in Drake and Orton, passed

from them by successive assignments and became merged in the Hutchinson Water, Light & Power Company, a corporation, and were so merged and existing when Ordinance 402 was passed March 5, 1897.

Sixth. That the Hutchinson Water, Light & Power Co. and its various assignors expended large sums of money in the erection, equipment and improvement of the water, light and gas properties, and that to enable them to do so they borrowed from time to time sums of money until in 1890 it aggregated $400,000, to secure which the Hutchinson Water, Light & Power Co. executed a mortgage for that sum on all the water, light and gas properties, franchises and rights.

Seventh. That thereafter the city became financially embarassed and defaulted in the payment of hydrant rental due from it so that before the year 1897 it had become indebted for such rental in the sum of $12,800 in excess of its ability to pay.

Eighth. On account of the default of the city in the payment of hydrant rental the Hutchinson Water, Light & Power Co., became embarassed and hindered in the payment of interest on its mortgage indebtedness and in the prosecution of its work of furnishing the municipal services it had agreed to furnish on account of which default of the company its mortgage bondholders took possession of its properties and operated the same for themselves during the year of 1896 and a portion of 1897, and until the readjustment of affairs

between the company and the city which took place in the spring of 1897, resulting in the passage of said Ordinance 402.

Ninth. That because of the embarassed condition of the Hutchinson Water, Light & Power Company caused by the default of the city, it became expedient to scale down the company's mortgage indebtedness, and to procure from the city an amended or new franchise and contract for furnishing the required municipal services; whereupon it was agreed by the company and the mortgage bondholders that in the event of and in consideration of the company securing a renewal and extension of its franchise and contract rights with the city, and a readjustment of the city's indebtedness to the company, they, the said mortgagees would scale down their indebtedness from $400,000 to $212, 500.

Tenth. That in March 1897 the Hutchinson Water, Light & Power Company at the special instance and request of the city, and in consideration of the city's inability to discharge its past due indebtedness to the company, and to pay the current indebtedness thereafter to become due under the existing contract, it, the company, agreed with the city to remit one-half of the indebtedness then due, that is, to scale it down to $6400, and also upon the like request and for the like reason the company agreed to reduce the sum thereafter to be annually payable for hydrant rental from $12,800 to $6000 for the remaining

years of the contract, to-wit, for eight years and seven months, and also on like request and for the like reason agreed to reduce the rate of hydrant rental per annum from $60 to $36 for all hydrants thereafter to be located on future extensions of the water-mains, and also to reduce the number of hydrants from twelve to ten per mile on such extensions; all which abatements and concessions to be made on the condition of a renewal and extension of the franchise and contract rights of the company. It was also further agreed on the company's part, in consideration of said renewal and extension, that the city might have, what it did not have under the existing contract, the right to purchase or otherwise acquire the light and gas properties at any time after ten years from the date of said renewal adjustment.

Eleventh. The city having solicited the company to make the aforesaid concessions and abatements, and having procured the agreement of the company to make the same, renewed and extended all the aforementioned original franchises and contracts, embodying in said renewal all said concessions and conditions, and to evidence and secure the same it did, by a certain ordinance No. 402, published and taking effect March 17th, 1897, grant to the company, its successors and assigns, for the period of 20 years from said date, the exclusive privilege of suppiying the city and its inhabitants with water, and also with light, heat and power by means of electric current, and also with gas.

Twelfth. One of the conditions of said renewal

ordinance, and one of the concessions made by the company to the city was that its right to furnish electric current or power should not be exclusive for the purpose of operating street railways, nor exclusive as to any person residing in the city, nor any company doing business therein, so as to prevent such person or company from manufacturing or using gas or electricity for his or its own use for light, heat or power.

Thirteenth The total monetary abatements made by the company for the considerations before mentioned were the cancellation of $6400 of past due indebtedness, the reduction of future hydrant rental from $12,800 to $6000 per annum for the period of eight years and seven months, the unexpired portion of the old contract, being in all a monetary abatement for past due and future services, of $65,240. None of which abatements nor any of the other concessions would have been made except in return and for the consideration of the exclusive rights and privileges conferred by ordinance Number 402.

Fourteenth. Afterwards, in 1898, the company's mortgage bondholders, in consideration of the adjustment between the company and the city, and as they had agreed to do in the event of such adjustment, scaled down their mortgage indebtedness pursuant to previous agreement to that effect, from the sum of $400,000, to $212,500, and cancelled their mortgage for the larger sum and accepted as a substitute therefor a mortgage on the property,

franchises and contracts with the company, and on its income of $212,500, which mortgage still remains unpaid and has twenty years yet to run.

Fifteenth. The Hutchinson Water, Light & Power Co. remained in the possession of its franchise and contract rights from the taking effect of Ordinance 402 until October 1902, when it sold and conveyed to the appellant all of its property, contracts, franchises and rights, since which time the appellant has been in their possession and enjoyment and has been fulfilling all the duties and obligations imposed on it under said ordinance. Said sale and conveyance to appellant and the appellant's assumption and discharge of all said ordinance obligations were made with the knowledge and consent of the city, and under its ratification and approval.

Sixteenth. Since the appellant's purchase from the Hutchinson Water, Light & Power Co. and in the discharge of the obligations resting upon it, it has expended large sums of money in the improvement and enlargement of its properties and the services rendered by it, and under the order and direction of the city has made extensions of its water-mains and placed hydrants on such extensions, and as agreed by it has reduced the number of hydrants on its extended mains from twelve to ten per mile, and generally has complied with all the orders and requests of the city as to the performance of all the services rendered by it whether it was by the contract of said Ordinance 402 re-

quired to comply with such orders or not.

Seventeenth. That all betterments and improvements made by appellant and all expenditures of money made by it, and all concessions made by it to the city, whether required by the terms of its contract or not, were made by it in reliance on the aforesaid obligations of the city and on the supposition of the city's good faith in carrying out all the terms and conditions of the ordinance contract.

Eighteenth. Notwithstanding all the matters and things before stated fixing and determining the appellant's contract rights, and the equities subsisting between it and the city outside of mere matters of contract, the city, regardless of said ordinance contract and equities, has enacted and published ordinances, assuming in one instance to grant certain individuals named, and in the other instance to grant to the Peoples Water, Light & Power Company, a corporation, the privilege for twenty years of establishing and operating in the city, plants and appliances for generating and selling electric light and power to the city and to its inhabitants, and for manufacturing artifiicial gas and piping natural gas, with the privilege to lay mains and pipes, and to erect poles and wires, etc., necessary to the performance of all said work, in opposition to the like business of appellant as authorized and secured to it by Ordinance No. 402, which action appellant avers illegally impairs its contract rights in violation of that

provision of the Constitution of the United States which forbids the impairment of the obligation of contracts by the several states.

Nineteenth. That notwithstanding the making by appellant of the large money abatements of past due indebtedness and reductions of contract prices on future services to be performed by it, neither the city nor any of the grantees or beneficiaries in the recently enacted ordinances have paid or tendered to appellant any sums of money in repayment of its abatements and concessions, or in anywise offered to make it whole in respect of the same, or to secure appellant against loss from the competition of the proposed rival company or association of persons.

Twentieth. That at the time the several public service enterprises were undertaken by appellant's grantors or assignors, and at the time that appellant succeeded to the said public service property, franchises and rights, the city of Hutchinson was small in population, at the first time was not more than 5000 and at the last time not more than 10,000 in number; that it would have been impossible at any of such times through lack of sufficient patronage to have maintained rival or competing companies in the city, and it is impossible now to maintain two companies in the city in competition with each other so as to enable either of them to earn a fair and reasonable income on the cost of their respective properties, and at none of the times when appellant or

its grantors or assignors undertook the work of furnishing said public necessities would it or they or anyone have agreed to perform the services except under the protection of a contract securing it, or them, for a reasonable time against the competition of rival companies, nor could the large sums of money necessary to enable the establishment, improvement and maintenance of said public service properties have been obtained from lenders or investors except under and in pursuance of a contract of security against the competition of rival concerns.

Twenty-first. That appellant has not, up to this time, by the operation of its properties secured the repayment of their purchase price and the cost of the betterments, improvements and extensions which from time to time have been made, nor will it be able to do so for many years yet to come.

Twenty-second. That appellant does not seek to prevent the granting by the city of a franchise or contract for the erection and maintenance of an electric railway in the city or elsewhere.

THE PRAYER of the bills is for an injunction against the city, and all persons claiming under it or under its direction or authority from doing any acts under the recently enacted ordinances which will affect the appellant's exclusive right during the term of its contract to furnish the city and its inhabitants with electric current, except for street cars and electric railways, and with gas.

ORDINANCE NO. 402.

The particular portions of Ordinance 402 under which appellant claims or which are material to be quoted are as follows:

"An ordinance to provide for a system of water works, electric light works and gas works, and supply of water, electric current and gas to the city of Hutchinson, and the inhabitants thereof.

"Whereas, The Hutchinson, Water, Light and Power Company is the owner of certain exclusive franchises and contracts with the city of Hutchinson, under which and in accordance with which the said company has expended large sums of money in constructing and building water works, electric light works and gas works, and in building up the business of said works, which are now in successful operation in supplying the city of Hutchinson and the inhabitants thereof with water, electric current and gas for all purposes for which water, electric current and gas is used; and

"Whereas, The City of Hutchinson is desirous of modifying and changing said franchise and contracts to the advantage of said City of Hutchinson without cancelling or abridging any of the rights or privileges

vested in said company by reason of its labor and investments under said franchises and contracts other than the modification hereinafter specified.

"Therefore, In consideration of the surrender of all the existing contracts and franchises of said company with the City of Hutchinson, excepting as hereinafter specified,

Be it ordained by the Mayor and Council of the City of Hutchinson, Kansas:

Section 1. That there is hereby given and granted to the Hutchinson Water, Light and Power Company, of Hutchinson, Kansas, its successors or assigns, the exclusive right and privileges for the term of twenty years from the date of the passage and approval of this ordinance of supplying the City of Hutchinson, Reno County, Kansas, and the inhabitants thereof, by a system of works with water for the prevention and extinguishment of fires and for all other purposes for which water may be used, (said water works to be the Holly system); with electric current for electric light and power, and for all other purposes for which electric current may be used, except power for the operation of street railways, which exception shall not prevent said Water, Light and Power Company from furnishing electric currents to street railways for any and all purposes; and with gas for lighting, heating and for fuel, and for all other pur-

poses for which gas may be used, in accordance with the terms and conditions set forth in this ordinance.

Section 2. That said Hutchinson Water, Light and Power Co., its successors or assigns, is hereby authorized to maintain, extend and operate said works in or adjacent to the City of Hutchinson, to receive, take, store, purify, conduct and distribute said water, electric current and gas through said city, to construct and extend aqueducts, mains, pipes and erect poles and wires through all the streets, alleys, lanes and public grounds and to cross any stream or bridge in said city, to erect and maintain all engines, machinery and other appliances necessary for conducting any of said works, and for supplying said city and the inhabitants thereof with water, electric current and gas for the purposes herein mentioned, and for such purposes the said Hutchinson Water, Light and Power Company, its successors or assigns, shall have the right, and is hereby authorized to use the streets, alleys, avenues, lanes and public grounds in or adjacent to said city, and shall have the right to take up any pavements or sidewalks, and make such excavations therein as may be necessary to lay, repair and maintain aqueducts, mains and pipes below the surface of the ground for conveying and distributing the water and gas, and for erecting poles for electric wires as aforesaid.

Section 8. The City of Hutchinson shall

have the right to purchase the works, property and business created, acquired, constructed and contemplated under this contract at any time after the expiration of ten years from the adoption of this ordinance, upon giving one year's notice to the owners of said property and upon paying to said owners a fair value for the same as may be mutually agreed, or fixed by a court of competent jurisdiction. Said one year's notice may be given at any time after the expiration of nine years from the date of the passage and approval of this ordinance.

Section 15. Nothing in this ordinance shall prevent any person or company from manufacturing gas, electricity or any other material for his or their own use for light or fuel, but in no case shall such persons supply others with gas or electric current for any purpose.

It does not seem necessary to set forth any portion of the ordinances under which the defendants claim, to-wit, Ordinance 651 Rec. Case No. 53 at p. 9 and Ordinance 661 Rec. case No. 54 at p. 12. It will be admitted, of course, that such ordinances are, as appellant says, an impairment of its contract rights provided it has the rights claimed by it under ordinance 402.

To the bills in both the cases demurrers for lack of equity were made and sustained, and the appellant failing to amend or do other than stand on its bills final decrees of dismissal were entered by the court.

SPECIFICATION OF ERRORS.

The Circuit Court erred:

First. In sustaining the demurrers of the defendants to appellant's bills for lack of equity in said bills.

Second. In holding that the contract set forth by appellant in its bills was not a contract valid and binding on the city of Hutchinson, appellee, and, therefore, not entitled to protection from impairment by the ordinances and other acts of the city assuming to vest rights in the other defendants to the subject matter of appellant's contract.

Third. In holding that the appellee, The City of Hutchinson, was not equitably estopped to grant franchises and rights to furnish electric light and gas to said city and its inhabitants to the other defendants to its bills, in opposition to appellant, without restoring to appellant the consideration it had given for its franchise and contract, or to otherwise make it whole against the damages it sustained.

Fourth. In finally dismissing appellant's bills of complaint.

The opinion of POLLOCK J. appears in the record of the Cases.

STATUTES OF KANSAS.

Text of material statutory provisions, *infra* pp.31, 32, 33, 34, 35.

BRIEF AND ARGUMENT FOR APPELLANT.

There has been much controversy before the courts over the question of the power of municipal corporations to make contracts conferring on individuals or incorporated companies the exclusive right to furnish the public utilities of water and light. The general view is that such power does not exist except as conferred by statute, either generally or specially, but no uniform general rule as to what language will confer the power, applicable to all cases, has been nor, indeed, can be laid down. That a legislative intent to confer the power must appear from the language of the statute is all that has been decided. In the cases now presented to the Court an ordinance-contract conferring on the appellant an exclusive right to furnish electric light and gas service was made, and it is the purpose of this brief to show, mainly by the aid of the decisions of this court, and of the Supreme Court of Kansas, that the Kansas Statutes authorized the making of the contract.

Before reaching to the statutes in question and as an aid to their interpretation we briefly premise some observations on the nature of the power exercised in furnishing the municipal necessities of water and light.

THE FURNISHING OF LIGHT TO A CITY AND ITS INHABITANTS IS AN EXERCISE OF THE POLICE POWER.

Pertinent to this proposition we refer to *New Orleans Gas Light Co.* vs. *Louisiana Light & Heat Co.*, 115 U. S. 650; *New Orleans Water Works Co.* vs. *Rivers*, 115 U. S. 674; *Louisville Gas Co.* vs. *Citizens Gas Light Co.* 115 U. S. 683; *City of Crawfordsville* vs. *Braden*, 130 Ind., 149.

By police power is not meant the mere power to conserve the primary social interests of health, safety, order and morals. It embraces as well regulations designed to promote the public convenience and the general prosperity and welfare. *Chicago, Burlington & Quincy Ry. Co.* vs. *The People of Illinois*, 200 U. S. 561; *Bacon* vs. *Walker*, Advance Sheets of U. S. Supreme Court Reports, Mar. 1st 1907. U. S.

In *People of New York* vs. *Van De Carr*, 199 U. S. 552, a case enforcing regulations on the sale of milk in the interest of the public health, the exercise of the police power as illustrated in *New Orleans Gas Light Co.* vs. *Louisiana Light & Heat Co.*, 115 U. S. 650, was classified with cases in assertion of the police power to regulate or

prohibit the sale of intoxicating liquors, to protect the public health, to dispose of garbage, etc. So, therefore, it would appear that the power to provide for the public convenience and to promote the general comfort and prosperity is of the same nature and proceeds from the same source as the power to assure the public safety and to safeguard the public health and morals. It is all police power.

In some of the decisions the power conferred upon municipal corporations to provide the public utilities of water, light, etc., has been spoken of as "business or proprietary" power. *Safety Insulated Wire & Cable Co.* vs. *Mayor and City Council of Baltimore*, 13 C. C. A. 375; *Illinois Trust & Saving Bank vs. City of Arkansas City*, 22 C. C. A. 171; *Omaha Water Co. vs. City of Omaha*, 77 C. C. A. 267.

This characterization has not been for the purpose of classifying the power to furnish the municipal services in question as a thing apart from the police power but to mark a distinction between those police powers that are exercisable on behalf of the general public, the whole state, and those exercisable for the special benefit of the municipal community.

If the term "business or proprietary" power as applied to the powers exercisable by the city should have a literal signification imposed on it two consequences would result—one each to the appellant and appellees. To the appellant would

result an inabilty to invoke the federal jurisdiction, because the contract, being a private convention, the attempt of the appellees to impair it could not be attributed to the state, but would be mere effort on the city's part to rescind. To the appellee it would result that the plea of ultra vires, which constitutes the sole defence, would fail, and the contract should stand, therefore, as like engagements between parties *sui juris*.

That the business or proprietary power of a city to furnish or contract for water, light, etc., is, nevertheless, only exercisable by delegation from the state,and that an attempt to repudiate a valid agreement executed thereunder is an impairment of the contract by the state was distinctly held in *Walla Walla* vs. *Walla Walla Water Co.*, 172 U. S. 1. It therefore follows that the municipal business power to furnish water and light is a part of the police power. It has been, in fact, so characterized in nearly all the decisions.

STATUTES DELEGATING THE POWER TO FURNISH LIGHT IN CITIES ARE TO BE LIBERALLY CONSTRUED, AND ARE SO CONSTRUED IN KANSAS.

A large measure of police power is exerted in a restrictive and, in general, in a penal form. In some particulars it becomes necessary for the good of the whole to curtail the natural freedom of the citizens; hence, personal liberty, freedom to contract and rights in property are often materially abridged and their free exercise punished. The rule of strict construction of these repressive and punitive powers is cardinal, but in the administration of municipal affairs there is a large measure of power which looks not to the restriction of the natural liberty of the citizen but to the melioration of his personal condition. This, ordinarily, is that business or proprietary power just spoken of. It is manifest that a grant of such power is to be viewed in a light entirely different from the power to abridge the liberty of the citizen or penalize his conduct. The one power should be jealously regarded and confined within the letter of the law, the other should receive a beneficial and enlarged construction. It is not true that the municipal exercise of a power which does not concern the state, but which concerns the urban

community alone, and especially if it be one the exercise of which is for the local improvement or advantage, should receive a strict construction. The very opposite is the rule.

In Michigan a statute authorized a city to issue bonds "for the refunding of bonds and evidences of indebtedness already issued." It was held to authorize the issuance of bonds to refund judgements. Judge *Cooley* said:

> "There is a principle of law that municipal powers are to be strictly interpreted, and it is a just and wise rule. Municipalities are to take nothing from the general sovereignty except what is expressly granted. *But when a power is conferred which in its exercise concerns only the municipality, and can wrong no one, there is not the slightest reason for any strict or literal interpretation with a view to narrowing its construction.* If the parties concerned have adopted a particular construction not manifestly erroneous, and which wrongs no one, and the state is in no manner concerned, the construction ought to stand. That is good sense, and it is the application of correct principles in municipal affairs." *Port Huron* vs. *McCall*, 46 Mich,, 565.

In Kansas the general rule that municipal corporations cannot mortgage or otherwise encumber the municipal property obtains, as does the rule that water-works owned by a city is in the full sense municipal property. A city purchased an existing water-works plant subject to an encumbrance payable in the future. Its power

to do so was challenged on the ground that it was in effect the giving of a mortgage on the city's property. In denying this contention the court laid down the rule of enlarged and beneficial construction for which we contend.

> "Cities are the agents of the state in the administration of government and possess such powers as are specifically delegated, and such other power necessary and incidental thereto which will enable them effectually to perform the duties imposed by the legislature as departments of government. In determining what duties are imposed and what powers are conferred the statute should be liberally construed, to effectuate the general purpose of the legislature."

> "The provision of section 8, supra, is 'that all cities of the first, second and third class * * * are hereby granted full power and authority on behalf of such cities to purchase, procure, provide and contract for the construction of, and to costruct, * * * water-works.' In the performance of this purely business trust no inhibition is imposed. They are circumscribed by no restriction, but are left free to exercise their best business judgment. They may contract to have water supplied by private corporations for any term of years and at any rate that seems to them to be for the best interests of the citizens. In contracting for the construction of waterworks they may determine the amount to be expended, and the time and manner of payment, as freely as an individual. In the construction of such works they may enter into an agreement with material-men

> and contractors, or they may employ a superintendent and day-laborers and construct such works under their own general supervision. Whichever course they pursue, they are at liberty to exercise their judgment for the best interests of the people. The legislature apparently intended that cities should be free to make the best contract possible in obtaining public utilities. Possessing this unrestricted power in the performance of a purely business transaction, we think cities may make the most advantageous contract possible. If they find that waterworks which are encumbered can be bought at an advantage, it is within their power to contract therefor." *The State vs. City of Topeka*, 68 Kans., 177-182.

A section of the statute largely relied on by appellant, because containing a clear and specific grant of power, viz. Section 816, infra, has been already given a liberal and beneficial construction by the supreme Court of Kansas. In *State ex. rel. vs. The City of Hiawatha*, 53 Kansas, 477, it was contended that a rule of strict construction of statutes conferring grants of municipal power should be applied, and that applying such rule to section 816 the city could not itself light its own streets but must contract the performance of such service to another, because the provision being that the city council should "provide for and regulate the lighting of the streets," such provision next followed by the specific one to make contracts with and give privileges to others for such work limited the power to the making

of contracts with others. This view the court refused to take, saying among other things that, "the statute should receive a fair and reasonable interpretation with a view to carrying out its object. It should neither be destroyed by an unreasonable strictness, nor stretched to include that which was not in the legislative mind."

The true rule of the interpretation of all classes of statutes was stated by this court in *United States* vs. *Hartwell*, 6 *Wall.*, 395.

> "The rule does not exclude the application of common sense to the terms made use of in the act in order to avoid an absurdity which the legislature ought not to be presumed to have intended. When the words are general, and include various classes of persons, there is no authority which would justify a court in restricting them to one class, and excluding others, where the purpose of the statute is alike applicable to all. The proper course in all cases is to adopt that sense of the words which best harmonizes with the context, and promotes in the fullest manner the policy and objects of the legislature. The rule of strict construction is not violated by permitting the words of the statute to have their full meaning, or the more extended of two meanings, as the wider popular, instead of the narrow technical, one; but the words should be taken in such a sense, bent neither one way nor the other, as will best manifest the legislative intent."

The rule of construction as above stated in the *Hartwell* case was quoted and applied by the

Circuit Court of Appeals of the Sixth Circuit in *Detroit Citizens Street Railway Co.* vs. *City of Detroit*, 64 *Fed.*, 628, a case involving a claim of exclusive franchise to operate a street railway.

In *Andrews* vs. *National Foundry & Pipe Works*, 61 *Fed.*, 782, the Circuit Court of Appeals of the Seventh Circuit held that a city having "the general powers possessed by municipal corporations at common law," and the specific powers "to provide for the erection of water-works for the supply of water to the inhabitants of the city," was not limited to the erection of water-works for itself, but was authorized to contract with another for the necessary water supply.

The rule of interpretation for which we contend is illustrated in nearly all of the cases to be hereafter cited under other cognate topics. Those thus far mentioned will serve, in the first instance, to support the claim of beneficial construction of statutes vesting municipal corporations with business or proprietary powers.

THE STATUTES OF KANSAS AUTHORIZED THE CITY OF HUTCHINSON TO MAKE THE EXCLUSIVE CONTRACT IN QUESTION TO LIGHT THE STREETS.

The statutes of Kansas authorizing the execution of the contract in question and in force at the time Ordinance 402 was passed, are *Chapter* 19 of the *General Statutes* of 1889, being the Act for the incorporation and government of cities of the second class, together with *Sections* 1401 and 1402 of the *General Statutes* of 1889, which Sections compose parts of *Chapter* 23, the act concerning private corporations. The following are the statutes:

> *Sec. 759* "Each city governed by the provisions of this act shall be a body corporate and politic, and shall have power:** Fourth, *To make all contracts, and do all other acts in relation to the property and affairs of the city necessary to the exercise of its corporate or administrative powers.*" General Statutes 1889, Sec. 759

Note the full and broad power here conferred—"To make all contracts" "to do all other acts in relation to the affairs of the city, etc."

Sec. 787. "The mayor and council of

> each city governed by this act, shall have the care, management and control of the city, and its finances, and shall have power to *enact*, ordain, alter, modify or repeal *any and all ordinances not repugnant to the constitution and laws of this state, and such as it shall deem expedient for the good government of the city*, the preservation of the peace and good order, the suppression of vice and immorality, the benefit of trade and commerce, and the health of the inhabitants thereof, and such other ordinances, rules and regulations as may be necessary to carry such power into effect." *General Statutes* 1889 *Sec.* 787.

Note the full and broad powers here conferred in order to give home-rule and local self-government:- "Any and all ordinances *it* (the Mayor and Council) shall deem expedient" for the welfare of the city, subject only to the restriction that such ordinances are not "repugnant to the Constitution and laws of the state," thereby in express terms making the governing body of the city the judge of what is expedient for the welfare of the City. The needs and wants of cities vary, and therefore the wisdom of allowing each local legislature this wide discretion to meet the requirements of the particular municipality.

> *Sec. 811.* "The council shall have power to open, widen, extend or otherwise improve any street, avenue, alley or lane, and also to vacate or discontinue the same whenever deemed necessary or expedient." General Statutes 1889, Sec. 811.

> *Sec, 816.* "*The council may provide for and regulate the lighting of the streets*, and the erection of lamp posts, and the numbering of the buildings in the city, and the construction of sewers; and the council shall have *power to make contracts with any person, company or association for such purposes; and give such person, company or association the privilege of furnishing light for the streets, lanes or alleys* of said city for *any length of time not exceeding twenty-one years.* It may also by ordinance adopt a method of numbering the buildings, and make contracts to secure the same to be done." *General Statutes* 1889. *Sec.* 816.

Observe here the express and specific power "to provide for lighting of the streets,"—the additional "power to make contracts with any person, company or association for such purpose" and the further specific authority to give such person, company or association the privilege of furnishing light for the streets, etc., for any length of time *not exceeding twenty-one years.*"

These powers are to be taken in connection with those mentioned in section 824 quoted infra, which gives express power to enact any ordinance relating *inter alia* to lighting the streets of the city not inconsistent with the laws of the state.

> *Sec. 817.* "The council may purchase or condemn, and hold for the city, within or outside the city limits, within five miles therefrom, all necessary lands for hospital purposes and water-works and

erect, establish and regulate hospitals, work houses and poor houses, and provide for the government and support of the same, and make regulations to secure the general health of the city, and to prevent and remove nuisances, and to provide the city with water; * * *." *General Statutes* 1889, *Sec.* 817.

Sec. 824. "*For any purpose or purposes mentioned in the preceding sections*, the council shall have power to enact and make all necessary ordinances, rules and regulations, and they shall also have power to enact and make *all such ordinances*, by-laws, rules and regulations *not inconsistent with the laws of the state as may be expedient* for maintaining the peace, good government and welfare of the city and its trade and commerce." *General Statutes* 1889. *Sec.* 824.

Sec. 1401. "Any gas or water corporation shall have full power to manufacture and sell, and to furnish such quantities of gas or water, as may be required by the city, town, or village where located, for public or *private buildings*, or for other purposes; and such corporations shall have *power to lay pipes, mains and conductors*, for *conducting gas* or water through the *streets*, lanes, alleys and squares in such city, town or village, *with the consent of the municipal authorities thereof, and under such regulations as they may prescribe.*" *General Statutes* 1889. *Sec.* 1401.

Sec. 1402. "*The municipal authorities of any city*, town or village in which any gas light or water corporation shall exist, are *hereby authorized to contract with any*

> *such corporation for the lighting*, or supplying with water, *the streets*, lots, lanes, squares and public places, in any such city, town or village." *General Statutes* 1889, *Sec.* 1402.

It will be observed, that so far as the ability of municipal corporations to procure a water supply by contract with others is concerned, the provisions relative thereto, are the general welfare clauses Secs. 759, 787, quoted *supra*, the general power to contract, in section 817 (which authorizes the city to provide itself with water), section 1401 (which authorizes incorporated companies to furnish water to cities,) and section 1402 (which authorizes cities to contract with corporations for a water supply.)

Under the above entirely general grant of statutory authority, the Supreme Court of Kansas has made a number of decisions, to be cited hereafter under another topic, affirming the power of cities of the second class to contract with others for a supply of water for themselves and their inhabitants. *Manley vs. Emlen, 46 Kans., 655; Wood vs. Water-Works Company., 33 Kans., 590-597; Water-Works Co. vs City of Burlington, 43 Kans., 725-728; The Columbus Water-Works Co. vs, The City of Columbus, 46 Kans., 666; The Columbus Water-Works Co. vs. The City of Columbus, 48 Kans., 99.*

Reference is made to the above cases at this time only for the purpose of calling attention to the liberal view entertained by the court of the power of the mayor and council to provide the city

and its inhabitants with the municipal necessity of water, and, by a parity of reasoning, with the like necessity of electric or other light.

It will be observed that the said statutes quoted *supra*, first empower cities of the second class to make all contracts and do all other acts in relation to the property and affairs of the city necessary to the exercise of its corporate or administrative powers, and to enact all necessary ordinances, and perform all necessary acts looking to the promotion of the general welfare of the city and its inhabitants, and its trade and commerce. (Secs. 759, 787, *supra*). These are followed by the more specific provision contained in section, 402, *supra*. That section in general terms authorizes the municipal authorities "to contract with any such corporation for the lighting or supplying with water the streets, etc." However, in addition to the general power to contract, and the general power to enact ordinances promotive of the welfare of the city, and in addition to the more specific grant contained in section 1402, a still more specific provision and, we think, a sufficiently specific provision is section 816, *supra*. That section in express terms vests the city council with power to provide for and regulate the lighting of the streets, and with power to make contracts with others for such lighting purposes, and to give to such others "the privilege of furnishing light for the streets, lanes or alleys for any length of time not exceeding twenty-one years." Language more explicitly expressing an absolute measure of power

could hardly be framed. The power is given to light the streets, to make contracts for the lighting of the streets, and to confer the privilege of lighting the streets for a specified term of years. It will be observed that the grant of power is to confer "the privilege of furnishing light". The definite article "the" is used. Power to confer *the* privilege implies *ex vi termini*, the exclusive privilege—not a fractional or communal privilege. The privilege to be conferred exists as a concrete and integral whole, and therefore, when conferred must pass in its entirety. The city possessed the privilege of lighting its own streets as a function of its municipal authority. It was that privilege in its integral and exclusive form which the legislature authorized the city to confer.

Cases justifying the making of contracts by cities conferring exclusive privileges on the public service corporations under legislative grants of authority less direct and specific than the authority conferred by Section 816 of the Kansas Statutes are numerous in the books. In *Vicksburg* vs. *Vicksburg Water-Works Co.*, 202 *U. S.* 453, it appeared that the legislature had conferred on the city the power "to provide for the erection and maintenance of a system of water works to supply said city with water, and to that end to contract with a party or parties who shall build and operate water works." that was the only grant of authority. The city contracted with another to erect and operate water-works, and, among the conditions of the engagement, stipulated that the

right of the contracting company to furnish water should be exclusive for thirty years. Subsequently the city undertook to erect a water-works plant of its own. It was held that it was precluded from doing so by the exclusive grant which it had made. This decision was in part rested on the preceding and similar one of the *City of Walla Walla* vs. *The Walla Walla Water Co.*, 172 *U. S.* 1. Together they establish the rule that municipal corporations under general legislative grants of authority to contract for a water supply may confer a right exclusive at least as against themselves for a term of years. On principle, there can be no distinction between the power of a city under a general grant of authority to contract for a water supply to bind itself not to compete with the contracting party and to bind itself not to allow others to compete. If a city under a mere authority to contract with another to furnish water to itself and its inhabitants, can bind itself for a term of years to abstain from erecting competing water-works of its own it must likewise possess the power to bind itself to abstain from allowing others to erect competing water-works. The power of a city to bind itself by the one condition proceeds from the same source as would the power to bind itself by the other condition. They are both derivable from the grant of authority to contract, and each one when exercised is in its essential nature and consequences the same as the other.

The police power of cities, under general

grants of authority, to contract with public service corporations for the enjoyment of certain immunities for terms of years is illustrated by other instances than those conferring exclusive franchise rights to furnish water. The power to contract to allow maximum rates for services rendered is a notable instance. In the the last one of the series of *Vicksburg Water-Works* cases, decided in May, 1907, it was held under the same statute as the one involved in the preceding cases that the city could bind itself by an agreement to allow a maximum charge to consumers of fifty cents per thousand gallons of water. It is true that in that case the court in reaching its conclusion was aided by decisions of the Supreme Court of Mississippi interpreting general grants of authority to contract. But an equal degree of assistance is furnished in this case by the Kansas decisions. The case of *State vs. The City of Topeka, 68 Kans., 177*, hereinbefore quoted from at length, is especially valuable. In that case among many other remarks illustrative of the liberal view to be taken of the power of cities to contract for a water supply it was said:

> "In determining what duties are imposed and what powers are conferred the statute should be liberally construed to effectuate the general purpose of the legislature: * * * In the performance of this purely business trust no inhibition is imposed, they are circumscribed by no restrictions but are left free to exercise their best business judgment."

In *City of Cleveland vs. The Cleveland City Ry. Co., 194 U. S. 517*, the court observed as follows:

> "The statutes show that there was lodged by the legislature of Ohio in the municipal council of Cleveland comprehensive power to contract with street railway companies in respect to the terms and conditions upon which such roads might be constructed, operated, extended and consolidated, the only limitation upon the power being that in case of an extension or consolidation no increase in the rate of fare should be allowed."

The most material of the statutory provisions lodging power in the city council of Cleveland was as follows: "Council or the Commissioners, as the case may be, shall have the power to fix the terms and conditions upon which such railways may be constructed, operated, extended and consolidated." Under this general grant of authority it was held that the city council's agreement to allow a maximum fare for a term of years was a binding obligation.

In Omaha Water-Works Co. vs. The City of Omaha, 147 Fed., 1, it appeared that the legislature of Nebraska had enacted the following provision:

> "And the Mayor and Council of each city created and governed by said act (an act of a previous year) shall have power to contract with and procure individuals or corporations to construct and maintain water works on such terms and under such regulations as may be agreed on."

Under this statute the city contracted with

the water company to allow it for a term of years to charge maximum rates to consumers. It was held by the Circuit Court of Appeals of the Eighth Circuit, that the statute authorized the city to suspend by contract for a reasonable term of years the power to regulate the water rates which the company might charge consumers. This case is valuable in that it shows by the citation of previous decisions that the power to exempt public service corporations from rate regulation and the power to exempt them from the competition of rival companies is one and the same, proceeding from the same source and exercisable alike under mere grants of authority to contract.

The case of *California Reduction Co.* vs. *Sanitary Reduction Works*, 199, U. S. 306, tends strongly to the support of the power exercised in this case. The difference between the two cases is not one of principle. The law in both cases involved an exercise of the police power, in the cited case to the end of public sanitation, in this case to the end of public convenience and safety. In California the constitution ordained that:

> "Any county, city, town or township may make and enforce within its limits all such local police, sanitary and other regulations as are not in conflict with general laws."

The statute provided that:

> "The board of supervisors of the city and county of San Francisco shall have power, by regulation or order, * * * to au-

> thorize and direct the summary abatement of nuisances; to make all regulations which may be necessary or expedient for the preservation of the public health and the prevention of contagious diseases; to provide, by regulation, for the prevention and summary removal of all nuisances and obstructions in the streets, alleys, highways, and public grounds of said city and county."

Under the above constitutional and statutory provisions, which are nothing but ordinary "general welfare" provisions, it was held that the board of supervisors might confer an exclusive contract right for fifty years to collect and remove garbage from the city of San Francisco, the court among other things saying:

> "The defendants criticise the ordinances because they give the exclusive privileges in question for a period of fifty years. But whether the period during which such privileges might be exercised should be long or short was a matter in the wise discretion of the board, and determinable wholly upon grounds of public policy. If may be that grants by public authority of privileges to be exercised for the benefit or in behalf of the public ought never to be for long periods. But it suffices to say that no such consideration can control the action of the judiciary."

UNDER THE GENERAL WELFARE CLAUSES AND THE GENERAL POWER TO CONTRACT, THE CITY HAD THE POWER TO CONFER AN EXCLUSIVE RIGHT TO FURNISH LIGHT TO ITS INHABITANTS AS WELL AS TO LIGHT THE STREETS.

The preceding topic was in elucidation of the power of the city, especially under Section 816 of the statute, to confer an exclusive contract right to light the streets and other public places. It is claimed, however, that the other provisions quoted are comprehensive enough to authorize the city to confer the like exclusive right to furnish light to its inhabitants. A case illustrative in a general way of the liberal view entertained in Kansas of the power of cities to contract with public service corporations is *Eureka Light & Ice Co. vs. City of Eureka*, 5 Kans. App., 669-676; 48 Pac. 935. In that case it appeared that a city of the second class had contracted for the deposit of a sum of money to be forfeited on failure of the light company to comply with the conditions of the contract. Objection of lack of power in the city to impose the condition of a money forfeiture in a

contract for municipal service was subsequently made. The court, however, said:

> "An examination of the statutes in relation to cities of the second class shows that the mayor and council have extensive powers over the affairs of the city. Under the power to make contracts and pass ordinances for the general welfare, trade, commerce and convenience of its citizens, and for the management and control of the city and its finances, and the specific authority to grant such a franchise as that in this case, the incidental power to make terms and conditions in its contracts is clearly possessed by each city of the second class."

In *Cherryvale Water Co. vs. The City of Cherryvale, 65 Kans., 219-228*, the court stated the character of contracts by cities of the second class with public service companies for furnishing municipal necessities, saying: "In the making of such contract the city exercised quasi private power, and was governed by the rules applicable to an individual or a private corporation."

But independently of the general grants of power to contract and to conserve the municipal welfare, the mere grant of power to be a municipal corporation carries with it by intendment the power to serve the inhabitants with all those necessities of urban life, such as water and light, which the individual is unable to procure for himself. A grant of power to a municipality to contract in behalf of and to provide for the general welfare of the constituency does but declare what might be

exercised without express mention. It is not, however, necessary to draw aid from the mere inferences resulting from municipal incorporation. The statute expresses what otherwise would exist by implication. However, an especially well reasoned case on the subject of implication of power, and one which is of value on the subject of construction of power when expressed is *Crawfordsville vs. Braden 130 Ind. 149.* In that case it appeared by a provision substantially the same as Section 816 *supra.*, that the city council was authorized to light the streets, alleys and other public places, and to contract with individuals or corporations for the performance of such service. The statute contained no authority to the city to furnish light to the inhabitants, but did contain authority to the city to make a grant to others of the right to furnish light to the inhabitants. It was held, however, that without a special grant of authority, but resulting from the fact of municipal incorporation and existence, the city had the power itself to furnish light to private consumers.

Under the general welfare provisions and under the general power to contract contained in municipal charters, it has been repeatedly held that power to provide the municipal necessities of water and light exists. *Manley vs. Emlen*, 46 Kans., 655; *Wood vs. Water-Works Co.*, 33 Kans., 590-597; *Water-Works Co. vs. City of Burlington*, 43 Kans., 725-728; *The Columbus Water-Works Co. vs. The City of Columbus*, 46 Kans., 666; *The Columbus Water-Works Co. vs. The City of Columbus*, 48 Kans.,

99; *Ellinwood vs. Reedsbury*, 91 Wis., 131; *Greenville vs. Greenville Water-Works Co.* 125 Ala., 625; *Grace vs. Hawkinsville*, 101 Ga., 553; *Webb City Waterworks Co. vs. Webb City*, 78 Mo. App., 422; *Aurora Water Co. vs. Aurora*, 129 Mo., 540; *Rome vs. Cabot*, 28 Ga., 50; *Heilbron vs. Cuthbert*, 96 Ga., 312.

A valuable case in affirmance of the large powers possessed by cities in the making of contracts for municipal services such as light, is City of *Newport vs. Newport Light Co.*, 84 Ky., 166. We especially invite the attention of the court to this case. The head note reads:

> "It being the duty of a municipal corporation to light its streets and to furnish its inhabitants with the means of obtaining gas at their own expense, where such a corporation has the power by legislative grant to erect and maintain gas works for that purpose, it necessarily follows that it has the implied power to contract with others to furnish it in like manner, and may, therefore. by contract, grant to a corporation the *exclusive* right to the use of its streets for that purpose for a term of years."

THE MUNICIPAL POWER TO FURNISH LIGHT CARRIES WITH IT THE OBLIGATION TO ENTER INTO ALL CONTRACTS AND TO EXERCISE ALL SUBSIDIARY POWERS WHICH THE CIRCUMSTANCES OF THE CASE REQUIRE.

That municipal corporations are vested with the power to light their streets and to furnish light to their inhabitants is, of course, beyond all question. That a deposit of such beneficial power imposes an obligation to exercise it is equally beyond question. The rule that a grant of power to be exercised to a beneficial end imposes the obligation to exercise it is so familiar that it needs no array of decisions for its demonstration.

In consideration of cases of the character of this one the mind is sometimes led to dwell less on the larger fact, viz. the obligation of the city to furnish the municipal necessity, and more on the minor and incidental subject of contract by which the desired end is reached; hence, there is frequently obtruded upon the courts, subjects pertaining to monopolistic grants and franchises to use the public ways, etc., etc. It is not claimed

that these secondary considerations should be wholly ignored, but it is claimed that they pertain to the mere mechanics, as it were, of the exercise of municipal power, and are not the things of substantive consequence. The thing of vital importance is the discharge of the municipal obligation. In the discharge of that obligation, means reasonably adapted to the end are permissible, and only when means plainly unreasonable are employed will the courts interfere. They are empowered to nullify municipal action when plainly unreasonable. *Frazee's Case*, 63 Mich., 396.

To illustrate the habit of swelling out the inconsequence of small things to the proportion of the things of magnitude, objection is sometimes made to municipal grants of exclusive right because their exercise involves what are termed franchises in the public streets. These objections overlook the decisions of the courts that the use of the streets attaches as an incident merely to the performance of the contract made with the municipality.

> "As cities of the second class in this state have power to supply the inhabitants with water, the authorities thereof may use or, as an incidental power, may permit the contractor or other parties to use the streets for this purpose." *Wood vs. National Water-Works Co.*, 33 Kans., 590-597.

> "The City of Oconto by its own charter had the power and, therefore, was under the duty of caring for the public health.

> That power it could employ in any reasonable way; if it chose, for instance, by contracting for a water supply through pipes laid in the streets. The making of such contract would of necessity carry with it the right on the part of the contractor to lay the pipes and to operate the plant. Such right is a franchise and the making of the contract, operating by necessary implication as a grant of the privilege or franchise the power given to make the contract, was power to grant the franchise." *Andrews vs. National Foundry & Pipe Works*, 61 Fed., 782; 10 C. C. A. 60-66.

> "Where a charter in terms gives a city power to supply, or authorizes its inhabitants to be supplied with water, the city council may use or as an incidental power may permit a contractor to use the streets for this purpose. The use of streets for the purpose of laying water pipes being necessary to the construction of waterworks the power to contract for their construction includes as a necessary incident, the power to contract for the use of the streets for that purpose." *City of Quincy vs. Bull*, 106 Ill., 337.

Objection also is sometimes made to municipal grants because conferring what are termed *monopolistic privileges*. This objection wholly overlooks not only the legal definition but the actual character of monopoly. The term monopoly is not predicable of a thing which is not of common right, and the privilege of furnishing water or light to the inhabitants of a city through the medium of the

streets is not of common right. Lord COKE defined a monopoly to be:

> "An exclusive right granted to a few of something which was before of common right—so that it is not a case of monopoly if the subject had not the common right or liberty before, to do the act, or or possess or enjoy the privilege or franchise granted as a common right."

The Gas Company and Waterworks Company cases, 115 U. S. are in affirmance of this definition of a monopoly. The right to supply the inhabitants of a municipality with water or light, and in doing so to utilize the public ways had never existed in the King's subjects, nor in the Republic's citizens, but was vested in the sovereignty, and, hence, could be granted only at the will of the sovereign. The only question, therefore, in a case like this is, has the sovereignty directly, or indirectly through its agencies, made the grant. The question, hence, becomes one merely of construction of the grant.

There can be no such thing as a monopoly, or a special or exclusive privilege, in the odious sense, unless accompanied by freedom from supervisory control. If a grant of privilege be made subject to regulation in the public interest, there can be no monopoly, nor any charge of favoritism. In the case of a municipal grant of that which is not of common right the city does but transfer to another that of which it itself had a monopoly. *City of Memphis vs. The Memphis Water-Works Co.*, *6 Heisk*, 495. Therefore if the grant be subject to

a reservation of right to control, no one can complain. If in the making of a municipal grant of a thing not of common right, the city transforms into checks and limitations that which, acting in its own power, it might dispense as benignancies and favors, there is no monopoly nor any exclusive privilege in the objectionable sense. *Eddy on Combinations*, Section 28.

There are no provisions in the ordinance under which appellant claims exempting it from police control in any respect, nor any contract provision as to rates for electric lighting or gas services furnished. The statutes vest the municipality with ample power to regulate appellants charges for services and in general to exercise police supervision over it. By Section 767, supra, the mayor and council are empowered "to enact, ordain, alter, modify or repeal any and all ordinances not repugnant to the constitution and laws of this state, and such as it shall deem expedient for the good government of the city, * * * the benefit of trade and commerce, * * * and such other ordinances, rules and regulations as may be necessary to carry such power into effect," and by Section 824, supra., the council is empowered "to enact and make all such ordinances, by-laws, rules and regulations not inconsistent with the laws of the state as may be expedient for maintaining the peace, good government and welfare of the city and its trade and commerce." The municipal power conferred by these statutes is the most extensive kind. It is a power to enact all ordinan-

ce deemed expedient for the good government of the city and the benefit of its trade and commerce, and certainly the curtailment within reasonable limits of the charges of a public service company is promotive of the good government of the city and for the benefit of its trade and commerce. More than that it is a power which may be exercised to the ends stated except as forbidden by some positive contrary prohibition. It is not a power to do such things as may be expressly allowed but it is a power to do everything not expressly forbidden. In the framing of a municipal code it is impossible to specify in detail the powers which may be exercised. General grants of authority must be of necessity conferred and such general grants are to be understood as inclusive of all appropriate and desirable specific powers. *Porter vs. Vinzant*, 49 Fla., 213.

Cases in denial of exclusive franchise rights in streets and other public highways, like *Detroit Citizens Street Railway Co. vs, Detroit Railway Co..*, 171 U. S. 48, and the supporting cases of *Minturn vs. Larue*, 64 U. S. 436, and *Wright vs. Nagle*, 101 U. S. 791, are also to be distinguished from this case, and on a ground analogous to that on which the distinction between monopolies of subjects of common right and delegations of sovereign franchises is drawn. The streets of a city like other public thoroughfares are of ancient common use. Everyone is and of all time has been privileged not only to travel on them himself on foot, on his animals, in his vehicles, and to trans-

port his goods thereover, but, also in the business of carrying others and the goods of others for hire. In making use of urban thoroughfares, as in making use of country highways, the subject or citizen always had and still has an undoubted right to monopolize the entire length and width, except such length and width as might be at the same time likewise used by another. The use of these highways, therefore, is, and always has been, of common right; and, hence, to grant a special franchise privilege in their use is to vitally impair a matter of ancient prerogative. No one as a matter of common right ever had or has the privilege of furnishing light or water to a city and its inhabitants; but everyone has and always had the privilege of using the highways of travel. Hence whoever claims the franchise of monopolizing the latter for a specified period, in a particular way, along a defined course, and exclusive as to a fixed immovable and fortified limit, must show an express grant of authority.

The case of *Regina vs. Train* et al., *2 Best & Smith, Q. B.* 640, gives point for legal purposes to the peculiar characteristics of a street railways use of the city streets. The case was indictment for the nuisance of maintaining tramways on the city streets without the grant of a Parliamentary right. The court said:

> "Supposing, however, for the present, that his proposition [a proposition by counsel for defendants] that an arrangement for the use of a highway in a parti-

> cular manner being for the advantage of the public generally would be an answer to an indictment for that arrangement, this case does not come within that principle, seeing that this was not an arrangement for the ordinary use of the highway and is very distinguishable from the cases he put. It may fairly be said, for instance, that the raising a portion of a highway for the use of passengers is allowable; but that is for the use of the highway qua highway. And I do not say that there may not be cases where arrangements for the advantage of one class of persons may be allowable though mischievious to another class. But what has been done here is not making any arrangement for the use of the highway in the ordinary manner of using a highway. On the contrary, it is withdrawing so much of the highway from its ordinary use as such; for it is idle to say that you can use as an ordinary part of this highway the portion taken up by the tramways."

The American decisions are to the same effect. In *Elliott on Roads and Streets, Section 761*, it is said, citing to many cases, that:

> "The grant of a right to use the streets of a city gives the company rights superior to those of persons riding or driving along the street. A street railway company must necessarily possess greater rights than those of the ordinary traveler, for, as is very evident, the cars of the company can not give and take the road, but must move upon the track. It is, therefore, the duty of those traveling in the ordinary mode to leave the track in order that the movement of the cars may

> be unimpeded. It is held without dissent that to the cars of the company must be yielded the right of passage, and that horsemen and vehicles must leave the track when cars approach."

The leading case in this country showing the effect of a grant of street railway franchise to impair or modify the ancient common privilege in a city's highway is *Citizens' Coach Co. vs. Camden Horse R. R. Co.*, 33 *N. J. Eq.*, 267, a headnote of which reads:

> "The right acquired by a horse railroad company, under a legislative grant authorizing it to lay rails in a public highway, and to run cars thereon, charging fare, is such as entitles it to exclude from the habitual and continuous use of its tracks all companies and persons engaged in carrying passengers for hire, in competition with it."

We respectfully invite the attention of the Court to this fully and carefully reasoned case.

In the case of a street railway the franchise is solely in the use of the highways. It does not consist incidentally or even mainly in the use of the streets, but it consists wholly in their use. Not so with water or light companies. Their franchises (if to be so called) are not in the streets as the end and purpose of the grant made but are in the streets as incidental only and subsidiary to the performance of a contract pertaining to another matter.

THERE ARE SPECIAL FEATURES IN THESE CASES AND SPECIAL EQUITIES POSSESSED BY APPELLANT WHICH REQUIRE THAT ITS CONTRACT WITH THE CITY BE UPHELD.

There are considerations special to these cases and apart from the general subjects hereinbefore discussed to which we now invite the attention of the Court. These are first the inability of the defendant city on account of its small population and the disinclination of investors, except under contracts securing exclusive advantages for a term of years, to provide itself with municipal necessities, and, second the monetary abatements and other concessions which were made to the city at its request as a consideration for the grant of exclusive privilege.

Of course, federal jurisdiction existing, this Court is competent to decide all questions in the case, and even to pass by the federal question and adjudicate on subjects wholly apart therefrom. *Holder vs. Aultman*, 169 U. S. 81; *Field vs. Barber Asphalt Paving Co* , 194 U. S. 618.

The bills charge that at the time the original contracts were made with appellant's grantors the

population of the city was small, not exceeding 5000, and at the time the original grants were surrendered and ordinance 402 enacted the population did not exceed 10,000; that at those times the appellant or its assignors, would not have undertaken the obligation to supply the city with water and light except upon the agreement to allow freedom from competition for the limited period named, which in the case of one of appellant's assignors was twenty-one years and in the case of the others, including appellant, was twenty years; that capital could not have been secured for the purpose of erecting and operating the necessary water and light plants either by appellant or any of its assignors except upon such agreement, nor could the necessary capital have been secured for such purpose by anyone else. Really, these averments state facts of which the Court itself will take judicial notice. Judicial notice often has been taken of such facts. They were noticed in the *Binghampton Bridge Case*, 3 Wall., 51, in *Walla Walla vs. The Walla Walla Water Co*, 172 U. S. 1-18, and in other cases. A city of the small population of Hutchinson, Kansas, at the time these contracts were made, cannot obtain for itself and its inhabitants the benefit of the municipal necessities of water and light without securing those who risk their money in the undertaking against that loss which would inevitably result from the competition of rival concerns. Hence, in the case of Hutchinson, as in nearly all other like cases the city, without the imposition of harsh terms by the

other contracting party did what the necessities of the case on its part required, and what business prudence by the other party required. It granted to those who undertook the enterprise it was unable to conduct itself, immunity for such short period of time as would enable the other parties to secure themselves against loss.

The bills also charge that the defendant city became financially embarassed and unable to meet the payments due from it to the company, because of which the company became unable to meet the interest obligations on its mortgage indebtedness. In consequence of these facts, and to avoid their recurrence, an agreement was made by which the company abated one-half of the defaulted indebtedness due it, and agreed to reduce the subsequent annual charge for hydrant rental secured to it by the existing contract more than one-half, for the remainder of the life of such contract. The total of these abatements accrued and to accrue was over $60,000. It was agreed that the number of hydrants per mile of extensions on mains, which by existing contract had been fixed at twelve should be reduced to ten, which, of course, further reduced the future income from hydrants on extended mains, one sixth. It was agreed that the city should, as it did not by existing contract, have the right after ten years to acquire the gas and electric service properties. In consideration of all these readjustments of the contract between the company and the city the company's mortgage creditors agreed to reduce and did reduce their

indebtedness from $400,000 to $212,500. It will be thus perceived that the company and its mortgage creditors paid an extraordinarily large and valuable consideration for all that was secured to them under the renewal ordinance number 402. If equitable considerations can be taken into account in determining the existence of municipal power, and in determining the reasonableness of Ordinance 402, and they surely can in determining the power of the city to abrogate or rescind contracts, the words of this Court in *Louisville Gas Co. vs. Citizen's Gas Co.*, 115 U. S. 683-698, are important to recall.

> "But it is argued that, as the defendant's charter of 1867 conferred upon it no exclusive privileges, the granting of such privileges in the Act of 1869 was without consideration, and is to be deemed a mere gratuity. To this it is sufficient to answer that, apart from the public services to be performed, the obligations of the company were enlarged by the Act of 1869, and its rights under that of 1867 materially lessened and burdened in the following particulars: The amended charter limited the profits of the Company to 12 per cent per annum on the par value of its stock, 2 per cent of which was required to be used for extensions and not to be capitalized, except at the end of each five years, while, under the original charter, the only limitation upon the prices to be charged private consumers was that they should not exceed the average charges in Philadelphia, Baltimore, Cincinnati Chicago and St. Louis; the amended charter

> limited the amount to be annually charged the city per lamp to $35, no matter what its actual cost was, while, under the original charter, the Company was entitled to charge the city for the actual cost of supplying, lighting and extinguishing lamps, not, however, exceeding the average charges in the before mentioned cities; and, by the amended charter, the Company was required to extend its mains when its income from lights would amount to 7 per cent on such extensions, while under the original charter such extensions were not required unless its income therefrom would pay 8 per cent. **These concessions upon the part of the Company seem to be of a substantial character, and constituted a sufficient consideration to uphold the grant of exclusive privileges. If the consideration appears now to be inadequate, upon a money basis, that was a matter of legislative determination, behind which the courts should not attempt to go."**

Let it be observed that the case of appellants or, what is the same its immediate grantor, was not that of an adventurer seeking in the first instance a franchise or contract of exclusive right. It may be doubtful whether one having no status whatever as a public servitor of municipal necessities, but who desired in the first instance to embark in the business of furnishing water and light in a city, could establish an equity merely by the purchase outright of exclusive franchise rights from the city. But the appellant was already in the city with an established water and light service property, property which had cost it $400,000 to erect

and improve. Its investment was jeoparded and needed to be safeguarded by the making of such new arrangement as could be reasonably made. At the city's solicitation and on the city's proposition of terms it entered into the new arrangement described in the bills. The preamble to ordinance 402 recites the company's ownership of exclusive rights, its large expenditure of money in establishing its plant, its successful performance of its work, and the city's desire to change the contract to its better advantage without substantive change of the company's franchises or privileges. Now, after scarcely half of the short contract period named in the new arrangement has elapsed, after the city has secured and retains the abatement of more than $60,000 of its indebtedness and has secured and retains other valuable concessions, the latter, instead of purchasing the property, as it has the right to do, seeks to repudiate its agreement and has invited a rival concern into the field to share in the fruits of the city's growth of population and improved condition to which appellant and its assignors have largely contributed. All this has been done without offering to make the appellant whole for what it was induced to forego or in anywise to secure it against loss. On the plainest principles of fair dealing it ought not to be allowed to do so. Not only do the general principles of equity as declared by all the courts condemn its action, but the Supreme Court of Kansas likewise condemns it.

The case of *Columbus Water-Works Co. vs. The*

City of Columbus, 48 Kans., 99, is strongly persuasive of appellant's equities in this case. In fact this case contains equitable features far stronger than those disclosed in the cited case. In that case it appeared that the company obtained a contract from the city to erect a water works plant and to furnish water to the city for twenty-one years to be paid for as hydrant rental. The city failed to levy a tax to pay the hydrant rental, whereupon the company brought mandamus to compel a levy. All the facts pertaining to the grant of right to erect and maintain the works and the city's continuing agreement to purchase water were set forth in the petition for the writ. To this petition a demurrer was filed raising the question of the power of the city to bind itself by an engagement covering twenty-one years of time. The court overruled the demurrer. Extracts from the opinion of the court are quoted:

> "So far as the plaintiff can make it, the contract is an executed one; and during the period of its existence while the city used the hydrants and paid the rental it became an executed contract, so far as the city was concerned. Now, the city having, by its contract and permission, invited the expenditure of a large sum of money by the plaintiff in erecting its works, in order to give the city such fire protection as it had agreed to pay for in the manner indicated in the ordinance, should not the water company be given a reasonable time in which it might have the benefits of a contract which had been

agreed to and recognized? Or, shall we say that, *because there was no express authority* to make the contract for the period of 21 years, it is therefore void? To hold to the latter proposition when the parties cannot be placed in the same condition they were in before the contract was executed, would be a violation of the plainest rules of good faith. The plaintiff alleges that in pursuance of the contract it has expended large sums of money in constructing its water plant; that bonds to the amount of $60,000 have been issued, which are secured by a mortgage upon said plant; that the rentals from private consumers of water, and other resources, are not sufficient to pay the interest on the bonds as the coupons mature, and it has no means of paying the interest except from the rentals which the city had contracted to pay; that the city has no other supply for water, and no other franchise has been granted; and that the city and its inhabitants are without protection from fire except as provided by the plaintiff; that the city is practically the same size it was in 1887, and the taxable property is substantially the same now as then. As the case stands here upon demurrer, of course we assume these facts to be true."* * * * * *

We do not wish to be understood as upholding the contract upon which the plaintiff relies for any particular period of time, but we are not prepared to say that it is void; neither would we apply the rule with the same strictness to municipal corporations that should govern private corporations organized for gain. Courts should be governed by the conditions and

> circumstances surrounding municipalities and regard them as branches of the sovereign government. When improved methods are offered which will give to the city better facilities in the way of water, lights, and travel, or in any other manner give to its inhabitants increased safety and protection, the governing power of the city should be free to act; but until such time comes, courts should not set aside contracts which have been in part, at least, executed, unless for some good cause. The circumstances surrounding each particular case will have to largely govern, and no fixed and determinate rule can be established. The facts as presented by the pleadings are not sufficient, in our opinion, to authorize us to say that the contract entered into between the city and the water-works company is *ultra vires*, and should not, therefore, be enforced."

In the above case of *Columbus Water-Works Co. vs. The City of Columbus*, the court referred to and quoted from the case of Brown vs. The City of Atchison, 39 Kans., 54, as declaratory of the rule of that state on the subject of the equitable burden to be assumed by a municipal corporation which would repudiate an executed agreement between it and another party on the pretense of illegality or lack of power. This case of *Brown vs. The City of Atchison* shows that the rule exists in Kansas, as elsewhere, that a municipal corporation, no more than a private corporation or an individual can induce another to expend labor or part with money in the performance of a contract not im-

moral—simply *malum prohibitum*, and, having thus obtained the fruits of an executed engagement repudiate it on the score of its technical illegality without doing equity to the deceived and innocent party.

In *Cherryvale Water Co. vs. The City of Cherryvale*, 65 Kans., 219, it appeared that after the city had granted a franchise to the water company it recognized a certain lake used by the company as a sufficient source of water supply, and on the strength of its sufficiency had taken steps to exercise a reserved option to purchase the water plant. It subsequently endeavored to rescind its action looking to the purchase, and also endeavored to cancel the company's franchise because of the inadequacy of the water supply. The court held that it could neither recall its election to purchase nor cancel the franchise; that it was equitably estopped from doing either, and in the course of its opinion the court generalized the nature of contracts between cities and public service companies, saying, as hereinbefore quoted, what we take the liberty to repeat that **"In the making of such contracts the city exercised quasi private power and was governed by the rules applicable to an individual or a private corporation."**

We respectfully urge that the decree of the Circuit Court be reversed for the reason that appellant is possessed of a contract right which the action of the city by the enactment of its recent ordinances has impaired, and for the further reason that on the facts of the case as disclosed by

the bills the city is equitably estopped to grant a franchise to a competing or rival concern without restoring to appellant what it gave up at the city's solicitation as a consideration for ordinance 402.

JOHN F. DILLON,
HARRY HUBBARD,
FRANK DOSTER,
HOUSTON WHITESIDE,
HOWARD S. LEWIS,
Solicitors for Appellant.

Office Supreme Court
FILED
NOV 8 190
JAMES H. McKEN

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1907.

THE WATER, LIGHT & GAS CO., *Appellant,* *vs.* THE CITY OF HUTCHINSON, KANSAS, ET AL., *Appellees.*	No. 53.
THE WATER, LIGHT & GAS CO., *Appellant,* *vs.* THE CITY OF HUTCHINSON, KANSAS, ET AL., *Appellees.*	No. 54.

REPLY BRIEF OF APPELLANT.

JOHN F. DILLON,
HARRY HUBBARD,
FRANK DOSTER,
HOUSTON WHITESIDE,
HOWARD S. LEWIS,
For Appellant.

C. G. BURGOYNE, Walker and Centre Streets, N. Y.

In the Supreme Court of the United States,

OCTOBER TERM, 1907.

THE WATER, LIGHT AND GAS CO., Appellant, vs. THE CITY OF HUTCHINSON, KANSAS, ET AL., Appellees.	No. 53.

THE WATER, LIGHT AND GAS CO., Appellant, vs. THE CITY OF HUTCHINSON, KANSAS, ET AL., Appellees.	No. 54.

REPLY BRIEF OF APPELLANT.

["CASES are not infrequent where, under a *general power* to cause the streets of a city to be lighted or to furnish its inhabitants with a supply of water, without limitation as to time, it has been held that the *City has no right to grant an exclusive franchise for a period of years; but these cases do not touch upon the question how far the City, in the exercise of an undoubted* POWER TO MAKE A PARTICULAR CONTRACT, *can hedge it about with limitations designed to do little more than bind the City to carry out the contract in good faith and with decent regard for the rights of the other party."—Opinion of Supreme Court per Mr. Justice* BROWN *in Walla Walla case*, 172 U. S., 1, 18; *approved by the Supreme Court per Mr. Justice* DAY in *Vicksburg Water-Works case*, 202 U. S., 453, 468.]

The learned counsel for the appellees (Brief in Case 54, p. 19) makes this statement and admission :

" Appellees do not wish to be understood as claiming that the grant involved in this case was absolutely void, but instead *they admit that the grant to appellant's assignor, in every particular except the alleged exclusiveness, is valid and binding upon the City*, and that the appellant cannot be denied the right and privilege of furnishing to the City and its inhabitants, for the full life of its franchise, such lighting service as may be contracted for. The contention of appellees is that in so far as the grant of privilege to the appellant's assignor attempted to confer exclusive rights, that such act was *ultra vires* and absolutely void."

This narrows the controversy to a single point, viz.: whether the *exclusive* feature of Ordinance 402 is *ultra vires* and void.

Appellants contend that this provision is authorized and valid. To present this subject it is necessary to call the attention of the Court to the *Statutes of Kansas*, to the *decisions of the Supreme Court of Kansas* construing these statutes and to the *decisions of this Court* in the *Walla Walla* and *Vicksburg* cases, which fully establish the validity of Ordinance 402 in every respect, including the exclusive feature.

To this question will this REPLY BRIEF be chiefly limited.

The Statutes of Kansas.

The Statutes of Kansas which authorize the City to pass Ordinance No. 402, including the exclusive feature for twenty years, are set forth in our main brief at pages 31, 32, 33, 34 and 35, to which we now refer. Judge POLLOCK'S opinion (Rec., No. 53, p. 59), also quotes Section 83, which is as follows :

" That cities of the second class of the State of Kansas are hereby granted full power and authority, on behalf of said cities to purchase, procure, provide and contract for the construction of and construct water works, electric light and gas plants, for the purpose of supplying such cities and the inhabitants thereof with water, light and gas for domestic use and any and all other purposes."

The construction of this language by the Supreme Court of Kansas in the *Topeka Water Works Case*, 68 Kans., 177–182, appears in our main brief, pages 26–28, to which we again specially refer,

since both in language and principle that decision shows that Ordinance 402 is within the lawful powers of the city, and not *ultra vires* in any respect.

Judicial Decisions in Kansas Construing and Applying the Above Mentioned Statutes of Kansas:

Topeka Case. Our Main Brief, pp. 26-28.

Hiawatha Case. Our Main Brief, pp. 28, 29.

Cherryvale Case. Our Main Brief, pp. 44, 65.

Wood's Case. Our Main Brief, p. 48.

Burlington Case, cited *infra.*

Columbus Case, cited *infra.*

THE SUPREME COURT OF KANSAS has decided in several cases that under the statutes of Kansas a city of the second class has authority to grant a franchise to a person or corporation to establish waterworks. See *Wood vs. National Water Works Co.*, 33 Kan., 590, 597; *Water Works Co. vs. City of Burlington*, 43 Kan., 725, 728; *Water Works Co. vs. City of Columbus*, 46 Kan., 666; *Water Works Company vs. City of Columbus*, 48 Kan., 99, 101.

In the case of *Water Works Company vs. Burlington* (43 Kan., 725) the city council of Burlington (a city of the second class) on July 14, 1886, passed an ordinance which took effect on July 16, 1886, giving to J. A. O'Neil and to his successors and assigns the right to *construct and erect water works* in the city of Burlington for *a period of twenty years*, the city however having the option to purchase the water works at their appraised value at the end of each five years, the city also in the meantime agreeing to rent for

the twenty years and pay for a number of hydrants. The validity of this ordinance was sustained by the Supreme Court of Kansas, the Court saying (page 728) as follows :

" In our opinion cities of the second class have the right and the power to provide for supplying themselves and the inhabitants of such cities with water *in the manner in which such right and power were exercised in the present case, and in various other ways.*"

Aside from the exclusive feature granted in terms in the *Hutchinson case* now under consideration, the ordinance of the city of Burlington was substantially the same as ordinance 402 of the city of Hutchinson.

In *Water Works Co. vs. City of Columbus*, 48 Kan., 99-101, the Supreme Court of Kansas states that " the authority of a city of the second class to make provision to furnish water to its inhabitants and for fire protection, *has been settled in this State ;* and a city has the authority to grant a franchise to a person or corporation to establish water works and is empowered to rent hydrants from such person or corporation." The Court, citing " Gen. Stat. 1889, Secs. 787, 817, 1401, 1402, 7185-7190 ; *Wood vs. Water Co.*, 33 Kan., 590 ; *Water Works Co. vs. City of Burlington*, 43 *id.* 725 ; *Water Co. vs. City of Columbus*, 46 *id.* 666 ; *Manley vs. Emlon*, 46 *id.* 656 ; Dillon, Mun. Corp., 4 ed., Secs. 146, 443, and note to sec. 568 ; 15 Am. & Eng. Encyc. of Law, 1115, 1118 and cases there cited)."

In the statutes of of Kansas water and light are embraced in the same or like provisions, and precisely the same principles judicially settled as to power of cities to provide for a supply of water apply equally to their power to provide for a supply of light.

The Exclusive Feature.

We come now to consider whether the city had the right to make the contract exclusive for the period of twenty years. That the city had such power we might rest upon a simple reference to the Kansas legislation and decisions above mentioned and the decisions of this Court in the *Walla Walla* and *Vicksburg cases.*

But as the appellees deny the applicability or controlling force of the cases in this Court, it is proper to consider the validity of Ordinance 402, both on principle as well as in the light of the Kansas decisions and the decisions of this Court in the cases just mentioned.

Our proposition is this.

Because making provision to light a city is a duty essentially and peculiarly pertaining to municipal rule and regulation and is not an extra municipal or abnormal power;

Because light is absolutely essential to the comfort, welfare and safety of the inhabitants of the city;

Because of the large necessary expense of erecting and maintaining light and distribution plants;

Because such plants are not capable of removal and are almost valueless unless they can be operated with some profit or return upon the capital invested;

Because it is unusual, unnecessary and impracticable to have two or more light plants and distributing systems in the same streets;

Because the public are fully protected by the State's power to fix reasonable rates and to prohibit unreasonable rates and by the police and taxing powers of the State and municipality;

Because without an exclusive right for a reasonable time the city may not be able, and in Hutchinson's case would not have been able, to procure a supply of light at all;

Because such contracts are *private* or *proprietary* in their nature, and not *governmental;* for these and the like reasons, under the statutory powers of cities in Kansas, the City of Hutchinson had the right to make an exclusive contract for light for twenty years and as incidental thereto to give for twenty years the use of its streets for distributing pipes, and also as incidental and in order to induce the investment of the necessary capital, the city had the right (especially as it expressly reserved an option to purchase the works) to stipulate with the persons furnishing the capital and building the works that it would not itself compete or grant to a rival company the use of its streets to compete for the limited period of twenty years.

This proposition is not only reasonable in and of itself, but it is fully supported by the decisions of the Courts generally and especially by the decisions of the Supreme Court of Kansas and of this Court.

As supporting the exclusive feature of Ordinance 402, we submit the following considerations:

(A) Next to Water, Light is the most urgent of municipal wants and necessities.

This is everywhere recognized, and statute and constitutional means for securing light are always provided.

Historical illustration that the "power to provide for light is one essentially and peculiarly pertaining to municipal rule and regulation," see 1 Dillon, Munic. Corp., Sec. 3*a* and notes respecting *Rome* and *London*. Said Section 3*a* and notes are as follows:

"In a most important particular, however, Rome suffers by comparison with modern cities. Its public places *were not lighted*. All business closed with the daylight. The streets at night were dangerous. Property was insecure. No attempt at public illumination was made. The idea does not seem to have occurred to them. Persons who ventured abroad on dark nights were dimly lighted by lanterns and torches.[1] Its condition was similar to that of London two hundred years ago, so graphically described by Macaulay, and whose description is partly given in the note.[2] No more forcible illustration of the necessity and advantages of lighting a city can be given than the pictures drawn by Lanciani and Macaulay of the state of a great city buried in the darkness of night; and they show how clearly the power to provide for this is essentially and peculiarly one pertaining to municipal rule and regulation."

---

[1] In Professor Lanciani's late work (1889), "Ancient Rome in the light of Recent Discoveries," it is said that: "The principal cause of disorder was that the metropolis was kept in *perfect darkness at night*. Why the idea of a system of public illumination was not conceived and adopted, is a mystery hard to solve. Excavations fully confirm the fact. Not a trace of a bracket fixed to the front of a house, or of a rope or small chain drawn across the street to support lamps or lanterns, has as yet been found, and probably none ever will be." *Ib.*, Chap. viii.

[2] Macaulay's History of England, Vol. I. chap. iii., entitled "The State of England in 1685." "When the evening closed in, the difficulty and danger in walking about London became serious indeed. The garret windows were opened, and pails were emptied, with little regard to those passing below. Falls, bruises and broken bones were of constant occurrence. For till the last year of the reign of Charles II. most of the streets were left in profound darkness. Thieves and robbers plied their trade with impunity; yet they were hardly so terrible as another class of ruffians. It was a favorite amusement of dissolute young gentlemen to swagger by night about the town, breaking windows, upsetting sedans, beating quiet men, and offering rude caresses to pretty women. I am confident that Milton was thinking of these pests when he dictated the noble lines:—

> 'And in luxurious cities, when the noise
> Of riot ascends above their loftiest towers,
> And injury and outrage, and when night
> Darkens the streets, then wander forth the sons
> Of Belial, flown with insolence and wine.'

(B) By reason of their necessity, Water, Light and Sewers are excepted from municipal constitutional debt-limit provisions, in

Alabama, Colorado, Montana, New York, North Dakota, South Dakota, Utah, Virginia, Washington, and possibly in the Constitutions of other States.

The following is a striking illustration of the municipal necessity for water and light, and that the means for providing them pertain to the ordinary powers of municipalities and of municipal regulation. Under the Constitution of *North Carolina* no debt involving power to tax can be created except for a "*necessary expense*" without a prior vote of the people of the municipality. It is held that a debt for water or light or for a water or light plant is a *necessary expense* and may be lawfully created without a vote.

Fawcett vs. Mt. Airy, 134 Nor. Car., 125.

In the case of *Fawcett vs. Mt. Airy, supra*, holding water and light to be a "necessary expense," MONTGOMERY, J., delivering the unanimous judgment of the Supreme Court, said :

"It is common knowledge that the most fearful scourges of certain most dangerous forms of fever arise from the use of water from wells in towns and cities ; and it is out of the power of *in-*

"In the last year of the reign of Charles II. began a great change in the police of London, a change which has, perhaps, added as much to the happiness of the body of the people as revolutions of much greater fame. An ingenious projector, named Edward Heming, *obtained letters patent conveying to him, for a term of years, the exclusive right of lighting up London.* He undertook, for a moderate consideration, to place a light before every tenth door, on moonless nights from Michaelmas to Lady Day, and from six to twelve of the clock. Those who now see the capital all the year round, from dusk to dawn, blazing with a splendor beside which the illuminations for La Hogue and Blenheim would have looked pale, may smile perhaps to think of Heming's lanterns, which glimmered feebly before one house in ten, during a small part of one night in three. But such was not the feeling of his contemporaries. There were quarters of London peopled by the outcasts of society where even the warrant of the Chief Justice of England could not be executed without the help of a company of musketeers. Such relics of the barbarism of the darkest ages [sanctuaries for criminals] were to be found within a short walk of the chambers where Somers was studying history and law, of the chapel where Tillotson was preaching, of the coffee-house where Dryden was passing judgment on poems and plays, and of the hall where the Royal Society was examining the astronomical system of Isaac Newton."

dividuals in towns and cities to erect and operate appliances for supply of water.

"*As to the question of lighting the streets and public places*, the experience of all who live in towns and cities of any considerable population is that without lights upon the streets and in the public buildings both life and property would be insecure, to say nothing of the almost complete destruction of the conveniences of life and the marring of its social features. The fire department, probably the most important of the municipal departments, would be rendered ineffective, and a considerable part of the commerce—trade of the country—would be destroyed; for under our changed conditions a good deal of the traffic between different communities and a respectable part of our mail service are conducted at night. It will not do to say that a city or town may expend money or incur a debt for the purchase of light by the month or the year, but that it may not incur a debt for the construction and operation of a system of waterworks or for the installment of an electric plant for lighting.

"*If the matter of lighting is a necessary expense, then how and in what manner the city shall furnish such lighting is with the authorities of the city or town to determine. The courts determine what class of expenditures made or to be made by a municipal corporation come under the definition of 'necessary expenses.' The governing authorities of the municipal corporations are vested with the power to determine when they are needed, and, except in cases of fraud, the courts cannot control the discretion of the commissioners.*

"Our conclusion, then, is that an expense incurred by a city or town for the purpose of *building and operating plants to furnish water and lights is a necessary expense*, and is not such a debt as must be submitted to a popular vote before it can be incurred, under section 7 of Article VII of the Constitution; and that under the general law of North Carolina in respect to cities and towns (Code, sections 3800 and 3821), municipal corporations may contract such debts and provide for their payment, unless there is some feature in the charter of such city or town which prohibits it.

"The *power to light the streets* and public buildings and places of a city *is one of implication, where it is not specially conferred*, because the use of such power is necessary to fully protect the lives and comfort and property of its inhabitants. It is a most important factor, too, in the preservation of the peace and order of the community. Croswell Law of Elect., sec. 190; *Mauldin v. Greenville*, 33 S. C., 1; *Lot v. Waycross*, 84 Ga. 681. In the case of *Crawfordsville v. Braden*, 136 Ind. 157, the Court said: 'So far as lighting the streets, alleys and public places of a municipal corporation is concerned, *independently of any statutory power the municipal authorities have inherent power to provide for lighting them.* If so, unless their discretion is controlled by some statutory restriction, they may in their discretion provide that form of light which is best suited to the wants and financial conditions of the corporation.' It

is well settled that the discretion of municipal corporations within the sphere of their powers is not subject to judicial control, except in cases where fraud is shown, or where the power and discretion are grossly abused to the oppression of the citizen. We can see no good reason why they may not also, without statutory authority, provide and maintain the necessary plant to generate and supply the electricity required.

"*Possessing authority to do the lighting, the power carries with it incidentally the further power to procure or furnish whatever is necessary for the production and dissemination of the light.*"

(C) **For like reasons the ordinary police and welfare clauses in a charter are sufficient without more to give a municipality power to procure a supply of water and light, and to do this, where the mode is not expressly restricted, by erecting works of its own, or by contract with others in the discretion of the municipality.**

1 Dillon Munic. Corp., Secs. 146, 443*n*, 568 note, opinion of STORY, Justice.

A late case, *Ellinwood vs. Reedsburg*, 91 Wis., 151, approves text (Sec. 144) and holds that a city under its general power as to *police* regulations, preservation of public *health* and general welfare had power to erect or provide for a system of water-works and *electric lighting plant.*

In *Commonwealth vs. Walton*, 182 Pa., 373, the city councils of Philadelphia appropriated by ordinance the sum of $10,000 for the charter purposes of the Pension Fund Association, a corporation organized to pay pensions to members of the association and to families of deceased members. Its membership was composed of persons belonging to the police force. It was held that the contribution was for a proper municipal purpose; that it was not contrary to any constitutional provision; and that statutory authority to the city "to make, ordain and establish such and so many laws, ordinances and regulations as shall be *necessary for the welfare and comfort of the city*" conferred power on the city council to make the appropriation. STERRETT, C. J., quoted the provision of the Pennsylvania Constitution that "The general assembly shall not authorize any city * * * to obtain or appropriate its money

for or loan its credit to any corporation, association or individual;" and said: "It is evident from an examination of the cases on the subject, that no strictly legitimate municipal purpose was intended to be prohibited. The evident purpose of the prohibition was to confine municipalities to the objects for which they were created and to restrain the legislature from authorizing any perversion of them. By the Act of March 17, 1789, which appears to be still in force the city councils of Philadelphia 'have full power and authority to make, ordain and establish such and so many laws, ordinances and regulations as shall be necessary for the welfare and comfort of the city.' We have no right to assume nor is there anything from which it may be fairly inferred that the Constitutional provision in question was intended to revoke or curtail any of the power or authorities with which the City Councils were theretofore vested by the *comprehensive grant above* quoted."

(D) **In view of the imperative necessity of a water and light supply the power "to provide water" when expressly conferred is liberally expounded as to the mode of its exercise, in order to secure the object to be attained.**

Thus, under the express power to "provide water," the municipality may submit to the voters the question of "*constructing*" or "*purchasing*," as the constitution does not limit the municipal discretion as to the *means* to be adopted to provide water.

City of Sioux Falls vs. Farmers' Loan & Trust Company, 136 Fed., 721.

And such is the express decision of the Supreme Court of Kansas.

Hiawatha Case, 53 Kans., 477.

Topeka Case, 68 Kans., 177–182. Both of these cases are referred to in our main brief, pages 26–28.

"It has been held that municipal corporations have inherent power to provide for lighting the streets, alleys and public places. If so, unless their discretion is controlled by some express statutory restriction, they may in their discretion provide that form of light which is best suited to the wants and financial condition of the corporation. * * * We see no good reason why they

may not also, without statutory authority, provide and maintain the necessary plant to generate and supply the electricity required. *Possessing authority to do the lighting carries with it, incidentally, the further power to procure or furnish whatever is necessary for the production and dissemination of the light.* * * * We see no good reason why it may not also at the same time furnish it to the inhabitants to light their residences and places of business. To do this is, in our opinion, a legitimate exercise of the police power for the preservation of property and health * * *." "*Power to provide 'for lighting the streets'* or '*to provide the city with water,*' will authorize a city to construct its own plant for that purpose. * * * But, as has been said, for a city to meet the demand for wholesome water is to perform a public act and confer a blessing. * * * It is not strictly a governmental or municipal function which every municipality is under obligation to assume and perform, but is very closely akin to it and should always be recognized as within the scope of its authority unless excluded by some positive law. * * * It cannot be said that the city in doing so is engaging in a private enterprise or performing a municipal function for a private end."

Elliott on Municipal Corporations, Sec. 146.

"A contract of a city granting a franchise for constructing and operating waterworks for furnishing water for public and private use within the city is within the incidental powers of the city, and is an *exercise of its business and proprietary powers* and not a delegation of a governmental function."

City of Gadsen vs. Mitchell, 40 So., 557.

"*Properly lighted streets* and public places give a certain degree of immunity from attack by thieves or burglars at night. A public corporation consequently is justified in attending to this, so it is claimed, as a Governmental duty, and supplying, either *through a system of its own or through an exclusive contract or otherwise* with private corporations or individuals, artificial light for lighting public places when necessary."

Abbott on Municipal Corporations, Section 146B.

Vicksburg Case.

The *Vicksburg case* came the third time before the Supreme Court of the United States in *Vicksburg vs. Vicksburg Water Works Co.*, 206 U. S., 496, decided May 27, 1905. The charter of Vicksburg authorized the city *to provide* "*for the erection* and maintenance of *a system of waterworks* to supply the city with water, and to that end *to contract* with a party or parties who shall build and operate the water-

works." This was the *only* legislative authority of the city in respect of water. No authority was given in terms to the city to grant an exclusive right, to make an exclusive contract, or limiting the power of the Legislature subsequently to regulate or reduce water rates. Under this charter provision the city passed the ordinance of November 18, 1886, which was involved in the two previous *Vicksburg cases*, 185 U. S., 65; 202 U. S., 453. What was decided in these previous cases is thus stated by Mr. Justice DAY in the opinion of the Court in the last case (206 U. S., pp. 496, 506):

"When the case was first here, reported in 185 U. S., 65, while there are expressions in the opinion affirming the validity of the contract and the authority of the city to make it, the issue really decided was as to the jurisdiction of the court as a Federal court, which was sustained, and the cause remanded for further proceedings. Upon the second hearing of the case, and the appeal here, the opinion shows that the adjudication was regarded as *settling the right of the Vicksburg Waterworks Company, under the contract, to carry on its business without the competition of works to be built by the city itself, as the city had lawfully excluded itself from the right of competition;* and it was further held, as incidental to that controversy, in passing upon an issue made in the suit, that the Vicksburg Waterworks Company had succeeded to all the right, title and interest of the original contracting party, and that the contract, having been made prior to the constitution of 1890, was not controlled by its provisions."

The contract of the city of *Vicksburg* with the Water Company contained an agreement on behalf of the city that the grantees "shall have the right to make such rates and charges for the use of said water as they may determine, provided that such rates and charges shall not exceed fifty cents for each thousand gallons of water." The ordinance by its terms ran for *thirty* years, and contained an agreement by the city to pay during that period a stipulated rental for certain hydrants for public use.

The question in the third case was stated (page 508) as follows:

"Had the city authority, under the charter of Vicksburg, passed in 1886, to make a binding contract fixing maximum rates for water supplied to private consumers for a definite period, thirty years in the present case."

The Court said (page 508) "that a State may, *in matters of proprietary rights*, exclude itself from the right to make regulations of

this kind, or authorize municipal corporations to do so, when the power is clearly conferred, has been too frequently declared to admit of doubt (*Los Angeles vs. Los Angeles City Water Company*, 177 U. S., 558; *Walla Walla vs. Walla Walla Water Company*, 172 U. S., 1-7; *New Orleans Waterworks Company vs. Rivers*, 115 U. S., 674; *Freeport Water Company vs. Freeport*, 180 U. S., 587-593."

By a *subsequent act* of the Legislature, passed in 1904, any city of Mississippi was empowered to prescribe by ordinance maximum rates and charges. Under this last legislative authority the city fixed maximum charges for the use of water less than the maximum rates fixed in the ordinance and contract of 1886. The Supreme Court of the United States decided that the contract rates were valid, and that the subsequent action attempting to reduce them was unconstitutional and void. Referring to the decisions in Mississippi bearing on the subject, the Court said:

"In the cases generally in this Court it will be found that in determining the matter of contract the local decisions have been given much weight, and, ordinarily, followed. As this is a Mississippi contract, and the power was exercised under the authority of an act of the Legislature of that State, we naturally look to the decisions of the courts of that State, particularly to such as had given construction to similar charters at the time the contract was made, with a view to determining the extent of the power conferred."

The opinion of the Court, which was unanimous, concludes as follows:

"In the light of these decisions, and others might be cited, we reach the conclusion that, under a broad grant of power, conferring, without restriction or limitation, upon the city of Vicksburg the right to make a contract for a supply of water, it was within the right of the City Council, in the exercise of this power, to make a binding contract, fixing a maximum rate at which water should be supplied to the inhabitants of the city for a limited term of years, and, in the absence of a showing of unreasonableness 'so gross,' as the court of Mississippi has said, 'as to strongly suggest fraud or corruption,' this action of the Council is binding, and for the time limited puts the right beyond legislative or municipal alteration to the prejudice of the other contracting party."

The second *Vicksburg* case, 202 U. S., 453, is referred to more fully further on.

Walla Walla Case.

As to the scope of statutory power "to provide a supply of water," &c., we next refer to *Walla Walla vs. Walla Walla Water Company*, 172 *U. S.*, 1. The Court, at page 3, states that the charter of the city

"enacted (Section 11) that the city should have '*power * * * to provide * * * a sufficient supply of water;*' and by section 10 'to grant the right to use the streets of said city for the purpose of laying gas and other pipes intended to furnish the inhabitants of said city with light or water, to any persons or association of persons for a term not exceeding twenty-five years, * * * provided, always, that none of the rights or privileges herein granted shall be exclusive nor prevent the council from granting the same rights to others."

Under this legislation the city passed an ordinance to procure a supply of water for the city of Walla Walla, granting to the water company, the complainant, for a period of twenty-five years from the date of the ordinance, the right to lay, place and maintain all necessary water mains, pipes, connections and fittings in all of the highways, streets and alleys of the city for the purpose of furnishing the inhabitants thereof with water. The city agreed to pay $1,500 per annum for the twenty-five years, the company agreeing (Section 7) to furnish an ample supply of good and wholesome water *at reasonable rates* to consumers at all times during said period of twenty-five years, further providing that until such contract shall have been avoided by the judgment of a Court of competent jurisdiction for substantial failure of the company to comply with its provisions, the city of Walla Walla shall not make, maintain or take interest in any water works except those hereinbefore referred to, and the city reserved the express right to take, condemn and pay for the water rights and works of the said company at any time. The Water Company accepted the ordinance and specifically complied with its terms and conditions, said ordinance never having been avoided by the city or the courts, and while the same was in force the city passed an ordinance for the purpose of itself supplying the city and its inhabitants with water, authorizing the purchase and condemnation of lands for that purpose, and the issue of bonds to provide the necessary funds. The water company brought a bill to prevent the carrying out of this purpose of the city erect-

ing its own water works. The city defended on the ground (p. 13) that the Council exceeded its powers in authorizing the contract with the water company for a continuous supply of water and the payment of rentals for twenty-five years.

The objections of the city as stated by the Court were as follows:

"The contract creates a monopoly which, in the absence of an express grant from the legislature of power so to do or such power necessarily implied, is void as in contravention of public policy. * * * Was void as an attempt to contract away a part of the governmental power of the city council."

These objections were unanimously held by the Supreme Court of the United States not to be well taken; this Court expressly adjudging that the contract was not one creating a monopoly, and that it was not void as an attempt to contract away the legislative power of the city council. The Court saying (p. 17):

"Nor do we think the contract objectionable in its stipulation that the city would not erect water works of its own during the life of the contract. There was no attempt made to create a monopoly by granting an exclusive right to this company, and the agreement that the city would not erect water works of its own was accompanied, in section 8 of the contract, with a reservation of a right to take, condemn and pay for the water works of the company at any time during the existence of the contract. Taking sections 7 and 8 together, they amount simply to this: That if the city should desire to establish water works of its own it would do so by condemning the property of the company and making such changes in its plant or such additions thereto as it might deem desirable for the better supply of its inhabitants; but that it would not enter into a direct competition with the company during the life of the contract. *As such competition would be almost necessarily ruinous to the company, it was little more than an agreement that the city would carry out the contract in good faith.*"

The following observations of the Court are especially applicable to the case now under consideration:

"*An agreement of this kind was a natural incident to the main purpose of the contract,* to the power given to the city by its charter to provide a sufficient supply of water, *and to grant the right to use the streets of the city* for the purpose of laying water pipes to any persons or association of persons *for a term not exceeding twenty-five years.*

"In establishing a system of water works *the company would necessarily incur a large expense in the construction of the power house*

and the laying of its pipes through the streets and, as the life of the contract was limited to twenty-five years, it would naturally desire to protect itself from competition as far as possible, and would have a right to expect at least the city would not itself enter into such competition. It is not to be supposed that the company would have entered upon this large undertaking in view of the possibility that, in one of the sudden changes of public opinion to which all municipalities are more or less subject, the city might resolve to enter the field itself—a field in which it undoubtedly would have become the master—and practically extinguish the rights it had already granted to the company. We think a disclaimer of this kind was within the fair intendment of the contract, and that a stipulation to that effect was such a one as the city might lawfully make as an incident of the principal undertaking."

Discussing the question of the continuing police power of the city, notwithstanding the contract, the Court says (p. 16):

"Under this power and the analogous power of taxation we should have no doubt that the city council might take such measures as were necessary or prudent to secure the purity of the water furnished under the contract of the company, the payment of its just contributions to the public burdens, and the observance of its own ordinances respecting the manner in which the pipes and mains of the company should be laid through the streets of the city. *New York v. Squire*, 145 U. S., 175; *St. Louis v. Western Union Tel. Co.*, 148 U. S., 92; *Laclede Gas Light Co. v. Murphy*, 170 U. S., 78. But where a contract for a supply of water is innocuous in itself and is carried out with due regard to the good order of the city and the health of its inhabitants, the aid of the police power cannot be invoked to abrogate or impair it."

(E) **In addition to power in the City of Hutchinson "to provide" for a supply of light, there is the further express provision (Secs. 816, 824) that**

"the council shall have power to make contracts with any person, company or association for such purposes; and give such person, company or association the privilege of furnishing light for the streets, lanes or alleys of said city for any length of time not exceeding twenty-one years" (Sec. 816).

Section 824 provides as follows:

"For any purpose or purposes mentioned in the preceding sections, [which includes lighting sec. 816] the Council shall have power to enact and make all necessary ordinances, rules and regula-

tions, and they shall *also* have power to enact and make all such ordinances, by-laws, rules and regulations not *inconsistent with the laws of the state* as may be expedient for maintaining the peace, good government and welfare of the city and its trade and commerce" (General Statutes, 1889, Sec. 824).

THESE ARE FULL AND COMPREHENSIVE POWERS. There is but one restriction and that is not, be it noted, upon the *power* to provide for lighting the city, but only upon the *mode of* the exercise of the power in case the City Council determines not to erect works of its own but to make a contract with others for such purpose. In that event, the important restriction is provided that the contract and the incidental use of the streets of the city may be "for *any length of time not exceeding twenty-one years.*"

This limitation contemplates and fairly implies that the city may find it necessary or expedient to make an *exclusive* contract for light and it limits the duration of any and all contracts to 21 years. Within that period it is supposed the contractor will get back his money. If it were meant by the Legislature that no exclusive contract could be made and that competition should be open from the start why limit the grant to 21 years?

This statutory power to contract is a full power without any limitation except as to the 21 years, and this limitation does not affect the right to make the contract *exclusive*, but on the contrary, this limitation implies and presupposes that such contract may be exclusive and therefore the statute limits its possible duration to 21 years.

The 21 years limitation is important to note for another reason. The express grants of power "to provide" light and to "make contracts" therefor would be a full and unlimited power unless it was restricted. The legislature so understood and it considered what restriction, if any, should be made, and the result was that the *only* restriction imposed was that no contract should be made exceeding 21 years. If any other restriction was intended it would have been expressed. Providing for only one restriction shows that no other restriction on the power was intended or deemed to be expedient or necessary.

The 21 years limitation is favorable to the appellants in another respect, namely, that it precludes any objection that might otherwise be made that a contract for so long a period is unreasonable and therefore void.

THE CARDINAL AND CONTROLLING FEATURE of Ordinance 402 is that it is a *proprietary or business contract* with the grantee for a supply of light (electric and gas) by means of the erection by the grantee at his own expense and cost of electric and gas plants and the incidental use of the streets for that purpose for the period of 20 years. It inverts and mistakes the whole nature of the transaction to treat Ordinance 402 as one primarily granting a franchise in the streets to the contractor and the contractor's obligation to furnish light as secondary or incidental.

Overlooking this fundamental distinction has led a few courts to apply too rigidly to such private or business contracts the doctrine of strict construction which is properly applicable to grants of public franchises as for example to street railway companies made under the *general powers* of the municipality. Into this error we submit with deference, fell the learned and able Judge who decided the present cases. His opinion wholly inverts and mistakes the actual case and leaves out of view the beneficial purpose of the legislation of Kansas on the subject of water and light. It makes the grant of the use of the streets the main thing in Ordinance 402, whereas the main thing is (as shown by the legislation and by the ordinance), the contract for light, and the use of the streets is merely incidental. That opinion also treats "the purely business contract" for a light supply as a grant of a public franchise to which the learned Judge applied the doctrine of strict —the strictest—construction, whereas such a contract should, in the language of the Supreme Court of Kansas, "be liberally construed to effectuate the general purpose of the Legislature" (*Topeka Case*, our main brief, p. 27).

THE SUPREME COURT OF KANSAS has taken the correct view of this matter in *Wood vs. National Water Works Co.*, where it says:

"As cities of the second class in this state have *power to supply the inhabitants with water*, the authorities thereof may use or, *as an incidental power, may permit the contractor or other parties to use the streets for this purpose.*" *Wood vs. National Water-Works Co.*, 33 Kans., 590–597.

PRECISELY THE SAME VIEW IS HELD BY THIS COURT, as will be seen by the extract from its opinion which is prefixed to this brief.

Other cases precisely to the same effect will be found in our main brief, pages 48, 49—the *Oconto* and *Quincy* cases.

The power "to enact ordinances," &c., (Secs. 727, 824); "to provide for lighting" (Secs. 816, 787, 824), and "to make contracts" therefor (Secs. 816, 824), is a full, cumulative, and comprehensive power to secure a given object, viz.: light for the city, and when, as in the present case, such powers are conferred without any restrictive words as to the ways and means or method of making such provision, the language in which the power is granted concurs with the nature of the deliberative body by which the power is to be exercised in manifesting the legislative intention to be that the governing body of the city may select and determine as to it may seem the most expedient and advisable the means and method of carrying the power into effect provided only that in the language of Sec. 787 they are "not repugnant to the constitution and laws of the state."

Chief Justice MARSHALL'S famous canon of construction in an analogous case as to the power of Congress (which has become fundamental in the construction of the Constitution of the United States), is applicable:

"Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consistent with the letter and spirit of the Constitution, are constitutional" (*McCulloch vs. Maryland*, 4 Wheaton, 316).

So here. The end—water and light for the city—is legitimate, for the statutes so expressly declare, and the express grant of the power to contract therefor carries with it all means which are appropriate and plainly adapted to that end, which are not prohibited by the Constitution or the laws of the State, and of *such* means the local legislative body of the municipality is the judge and not the Courts.

And if it were a judicial question and if this Court could review the *reasonableness* of the action of the City Council of Hutchinson in 1885 and 1886, when the original contracts were made, and in 1897 when ordinance 402 was passed, and in so doing consider the situation and wants of the city and all of the surrounding circumstances, we feel confident that this Court would find that the city made reasonable and advantageous contracts.

The power to provide light and to make contracts and enact ordinances for that purpose is, we repeat, *a full and comprehensive power in* the City Council as the governing body of the municipality

acting in good faith and without fraud to make any contract for light it may deem expedient or necessary, provided it is "not inconsistent with the laws of the State" (secs. 816, 824 and 784, Gen. St., 1889, quoted at large in our main brief, pp. 31–34).

These are Home Rule provisions. The wants and the ability or means of supplying such wants vary with each municipality, and hence the wisdom and necessity of these home-rule powers, and they ought not to be viewed by the courts with a hostile or jealous eye.

Especially is this so where the subject matter of the contract or ordinance, as in this case, is, in the language of this Court, "proprietary" rather than governmental in its nature (3d Vicksburg Case, 206 U. S., 496, per Mr. Justice DAY), or, in the language of the Supreme Court of Kansas, is "a purely *business transaction* where the legislature intended that the cities should be free to make the best contract possible in obtaining public utilities."

The Supreme Court of Kansas further says:

"In the performance of this purely business trust [procuring a water supply] *no inhibition is imposed. They are circumscribed by no restriction, but are left free to exercise their best business judgment.* They may contract to have water supplied by private corporations for any term of years and at any rate that seems to them to be for the best interests of the citizens. In contracting for the construction of water-works they may determine the amount to be expended, and the time and manner of payment, *as freely as an individual.* In the construction of such works they may enter into an agreement with material-men and contractors, or they may employ a superintendent and day-laborers, and construct such works under their own general supervision. Whichever course they pursue, they are at liberty to exercise their judgment for the best interests of the people. The legislature *apparently intended that cities should be free to make the best contract possible in obtaining public utilities. Possessing this unrestricted power in the performance of a purely business transaction, we think cities may make the most advantageous contract possible.* If they find that water-works which are encumbered can be bought at an advantage, it is within their power to contract therefor."

State vs. City of Topeka, 68 Kans., 177–182.

Under the legislation of Kansas and the judicial decisions construing it, we make bold to say that the claim that the *exclusive* feature of Ordinance 402 is inconsistent with the laws of Kansas is

without foundation. Where is the statute and where is the decision of Kansas to that effect? They cannot be found. They do not exist.

Ordinance 402 Demonstrably Valid.

APPLYING THESE PRINCIPLES as thus settled by the Courts of Kansas and by this Court, it seems to us that it is DEMONSTRABLE THAT THE EXCLUSIVE FEATURE of *Ordinance 402 is fully warranted.* Under Sections 787, 816, and 824 of the Kansas Statutes no one can deny that the City Council could make with a grantee in consideration that he would erect the works an *exclusive contract* to take light for the city for 21 years. The statutes expressly say so, and such a contract for 30 years was sustained by this Court in the third *Vicksburg case* (206 U. S., 496). And if so it necessarily results that the City Council can correspondingly give to the contractor who erects the works and supplies the light the *exclusive incidental right* to use the streets for the life of such contract. If any answer is possible to this argument and this conclusion we are utterly unable to see it.

THE VICKSBURG CASES CONTROL THE PRESENT CASE.

Under the legislation of Kansas and the decisions of the Supreme Court of Kansas, the Vicksburg and Walla Walla cases decided by this Court are entirely applicable to the Hutchinson case, and establish, under the facts stated in the bills of complaint, the validity of the exclusive feature of the contract in Ordinance 402.

In the following double columns are shown the respective charter and statutory powers of *Vicksburg* and *Hutchinson*, and the exclusive contracts those Cities severally made:

CHARTER POWER OF CITY OF VICKSBURG (202 U. S., p. 465).

"To provide for the erection and maintenance of a system of water-works, to supply said city with water, and to that end to contract with a party or parties who shall build and operate water-works."

(There was no other express charter or statutory power in the city.)

THE CONTRACT MADE BY THE CITY OF VICKSBURG IN THE ORDINANCE OF NOVEMBER 18, 1886, IS AS FOLLOWS (202 U. S., p. 463):

Section 1 of the ordinance provided "that, in consideration of the public benefit to be derived therefrom, the *exclusive right and privilege was granted for the period of thirty years* from the time the ordinance took effect, to Samuel R. Bullock & Company, their associates, successors and assigns, to erect, maintain and operate a system of waterworks in accordance with the terms of the ordinance, *and of using the streets*, alleys, etc, within the corporate limits of the city, as they then existed or might thereafter be extended for the purpose of laying pipes and mains and other conduits, and erecting hydrants and other apparatus for the obtaining of a good water supply for the City of Vicksburg and for its inhabitants, for public and private use. There was a stipulation for certain hydrants for the term of thirty years at an annual rental of $65.00 each, and it was provided that Bullock & Company, their associates, successors and assigns, might procure the organization of a waterworks company and assign their rights and privileges under the ordinance to such corporation."

STATUTORY POWER OF THE CITY OF HUTCHINSON (Sec. 816, G. S. 1889.)

"SEC. 816. The council may provide for and regulate the lighting of the streets, * * * and the council shall have power to make contracts with any person, company or association for such purposes; and give such person, company or association the privilege of furnishing lights for the streets, lanes or alleys of said city for any length of time not exceeding twenty-one years."

THE CONTRACT made by the City of *Hutchinson* as to the exclusive right in Ordinance 402 is as follows:

"SECTION 1. That there is hereby given and granted to the Hutchinson Water, Light and Power Company, of Hutchinson, Kansas, its successors or assigns, *the exclusive right and privilege for the term of twenty years* from the date of the passage and approval of this ordinance of supplying the city of Hutchinson, Reno County, Kansas, and the inhabitants thereof, by a system of works with water for the prevention and extinguishment of fires and for all other purposes for which water may be used (said water works to be the Holly system); *with electric current for electric light* and power, and for all other purposes for which electric current may be used, except power for the operation of street railways, which exception shall not prevent said Water, Light and Power Company from furnishing electric currents to street railways for any and all purposes; *and with gas for lighting*, heating and for fuel, and for all other purposes for which gas may be used, in accordance with the terms and conditions set forth in this ordinance."

On the foregoing comparison of the respective charter or statutory powers of *Vicksburg* and *Hutchinson* the particulars to note are these:

1. That the specific power "to *provide*" for a water supply and "to that end *contract*" for building water works, &c., are identical in the two cases, and in addition Hutchinson has general powers

(Secs. 817, 824) not expressly conferred upon Vicksburg. *Therefore, if Vicksburg had*, as this Court held, the power to make an *exclusive* contract, Hutchinson had in this respect at least equal, if not greater, power.

2. That no charter power was given to *Vicksburg* in express words to make an *exclusive* contract, and yet the city was held to have the right, in consideration of the grantee or contractor building the water works, to give him

"the *exclusive* right and privilege for 30 years to erect, maintain and operate a system of water works and *of using the streets*," &c., therefor, and also the right to make a binding *exclusive contract* to take water for the city for 30 years, for its own use at a maximum rate fixed in advance.

This is, let be it noted, a conclusive answer to cases cited in the opinion below, or by the appellee's counsel here, which inconsiderately or erroneously hold that in no case can a valid exclusive contract for water or light be made unless the Legislature has in so many words thus provided.

3. Within the thirty years *Vicksburg*, repudiating its contract, undertook to build waterworks of its own, and this Court held that this course was in violation of its contract, saying (202 U. S., 470), that

"It (the City) has contracted with the company, in language which is unmistakable, that the rights and privileges named and granted shall be *exclusive*."

It was urged in behalf of the city that although it might lawfully grant to others the right to erect water works, it could not abdicate its own power to build water works or "bargain away its duty to protect the public health and the public safety as they are involved in supplying the people with sufficient water" (p. 472, HARLAN, J.). It was in answer to such a contention that the Court used the language referred to by the appellees' counsel (Appellees' Brief in No. 53, pp. 21, 22). What precedes and what follows in the Court's opinion the extract there given by the appellees' counsel shows that the rationale and ground work of the decision of this Court was that the City had validly contracted

that the right of the Waterworks Company should be *exclusive*, the Court saying (p. 470):

"If the right is to be exclusive, as the city has contracted it shall be, *it cannot at the same time be shared with another*, particularly when such division of occupation *is against the will of the one entitled to exercise the rights alone.*"

There is absolutely nothing in the opinion of the Court (for the point was not involved) that the city while it might exclude itself from the right to compete, could not exclude others. There is no difference in this respect so far as the power of the city is concerned. If there is any difference it would be easier to hold that the city could not exclude itself from the exercise of *its* charter power to provide water, than to hold that it could not agree that it would not grant a competing right to others. Under the facts stated in the bills of complaint in the Hutchinson cases, the competition of the appellees is equally injurious to the appellants as would be competition by the city—either would mean bankruptcy to the appellants.

The very fact that the city in Ordinance 402 (Sec. 8) reserved the valuable option or right to purchase shows that it was not contemplated that there would be a rival plant, for why would the city, if it purchased, wish or provide for a competitor in the business?

THE ALLEGED DISTINCTION made by the appellee's counsel that although the city, under the exclusive provisions of the contract, cannot itself compete, it can give a rival company that right, has no foundation either in the language or purpose of the provision, on which to rest. *The proposition will not march!*

The term "exclusive right" means and was clearly intended to mean, that the company has the right to *exclude for the 20 years any other person or corporation from pursuing the same business*, that is, the right to exclude competition, and it is a right manifestly conferred upon the company for its own benefit (*St. Louis vs. Gas Light Co.*, 70 Mo., 69, 118).

And in ordinance 402 the word "exclusive" meant to exclude for the 20 years competition by the city itself or by subsequent voluntary grantees of the city. What kind of an inducement to invest a large amount of capital in a small city would it be for the city to say: "We will not compete for the 20 years, but we reserve

the power to grant to others the right to compete." If the City of Hutchinson had said *then* what it claims *now*, it would have been without water, electric light and gas works down to this present.

The case is the same in principle that it would have been if at the time of the passage of said ordinance No. 402 there were no water works, electric light works or gas works in the city of Hutchinson, and said ordinance No. 402 had been passed with provisions to enable the city of Hutchinson to obtain for the first time a supply of water, gas and electric light, for itself and its inhabitants.

Said ordinance 402 recites as follows:

"Whereas, The Hutchinson Water, Light and Power Company is the owner of certain exclusive franchises and contracts with the city of Hutchinson, under which and in accordance with which the said company has expended large sums of money in constructing and building water works, electric light works and gas works, and in building up the business of said works which are now in successful operation in supplying the city of Hutchinson and the inhabitants thereof with water, electric current and gas for all purposes for which water, electric current and gas is used; and

"Whereas, The City of Hutchinson is desirous of modifying and changing said franchise and contracts to the advantage of said city of Hutchinson without cancelling or abridging any of the rights or privileges vested in said company by reason of its labor and investments under said franchises and contracts other than the modifications hereinafter specified;

"Therefore, in consideration of the surrender of all the existing contracts and franchises of said company with the city of Hutchinson, excepting as hereinafter specified."

The City sought the adjustment embodied in ordinance 402.

The facts at the time of the passage of said ordinance No. 402 were, the City of Hutchinson had fallen in arrears in the payment of hydrant rentals, the exclusive franchise of the Water, Light and Power Company had, in 1897, eight years and seven months yet to run, and the city desired among other things to have its debt to the company compromised and to have a reduction made in hydrant rentals, and also desired to assure itself of an adequate supply of water, gas and electricity for the prospective needs of the city as it continued to grow.

See details in Bill of Complaint, Rec. in No. 53, pp. 31, 32.

As an inducement to the Water, Light and Power Company to accept the provisions of ordinance 402 and comply with its provisions to furnish an adequate supply of water, gas and electric current for the city and its inhabitants in the future and to make the adjustments as to indebtedness and as to hydrant rentals which the city desired, and to give the city for the first time the right to purchase the works and plants, it was competent and reasonable for the city to make provision in said ordinance 402 that the franchise should be exclusive for 20 years, as provided in said ordinance, the City meantime retaining its full police and legislative power unsurrendered. In the *Vicksburg case* above cited the Supreme Court of the United States held that it was competent for a city having power to contract as to water similar to the power which the city of Hutchinson had as to water, gas and electric current, to provide as a means of inducing a company to make the necessary investment of money to furnish such supply of water, that the right to furnish the water to the City and its inhabitants should be exclusive for a reasonable term of years ; and in the present case as an inducement to the Hutchinson Water, Light and Power Company to continue to supply water, gas and electric current, and to furnish such additional supplies as might be required from time to time, and to make adjustment as to hydrant rentals and as to indebtedness, and to newly give the City the right to purchase, it was equally competent for the City of Hutchinson to provide that the grants in said ordinance 402 should be exclusive. Inasmuch as the City had specific statutory power to contract, and inasmuch as the provisions of ordinance 402 are not unreasonable as a matter of law or matter of fact, it was within the power and discretion of the City to make such grants exclusive for the term therein mentioned. This case is not, on its facts, different in principle from the *Vicksburg case*, and the decision ought to be the same, namely, that the grant of an exclusive franchise was, on these facts, reasonable and valid.

The same decision as in the *Vicksburg case* was previously made in *Walla Walla vs. Walla Walla Water Company*, 172 U. S., 1. In both these cases the cities themselves, that is, the cities of *Vicksburg* and *Walla Walla* were proposing to construct or establish city water works. In the *Vicksburg case* the Court did not decide, nor was it called upon to decide, whether or not under the grant, which was in its terms "exclusive," it lay within the power of the city to make a grant to a third person or corporation to erect waterworks

in competition with the Vicksburg Waterworks Company. The ground of the decision of the Supreme Court was that inasmuch as the **city had power without restriction except as to the term, to make a contract to provide for a water supply, it was fairly incident to such a contract to provide as an inducement to the necessary expenditure of capital for the construction of the works that for a reasonable time, which was fixed by statute, the right should be exclusive**; and this principle applies equally whether the competition during the term of the grant shall be by the city itself or by a third person or corporation. In our judgment, therefore, if this court adheres to the principles on which the decisions in the cases of *Vicksburg vs. Waterworks Company* and *Walla Walla vs. Walla Walla Water Company* were made, it must hold that ordinance 402 was in all respects valid, and that the right of the appellant company to supply the city and its inhabitants with water is exclusive for the term provided in the contract, for it is impossible that the right shall be *exclusive* if some one else shares in the right, whether it be the city or a third party.

The course pursued by the City means ruin and bankruptcy to the appellant company; and to its bondholders who relied upon the City's contract it means almost a total loss, without any advantage to the City.

This is emphatically a case where the following two great principles of justice declared by this Court are especially applicable:

I. "*Square dealing*"; *municipalities not immune from moral obligation.*

Corporations, equally with individuals, are held to a careful adherence to truth in their dealings with mankind, and cannot, by their representations or silence, involve others in onerous engagements, and thus defeat the calculations and claims their own conduct has superinduced.

Zabriskie vs. Railroad Co., 23 How., 381.
Bissell vs. Jeffersonville, 24 How., 287.
National Life Ins. Co. vs. Board of Education, 62 Fed., 778.
Hitchcock vs. Galveston, 96 U. S., 351.
Hughes County vs. Livingston, 104 Fed., 306, 316.
Hackett vs. Ottawa, 99 U. S., 86, 96.

So in Kansas:

"The rule of ordinary morals applies as strongly to a municipality as to an individual." *Water-Works Co. vs. City of Columbus*, 48 Kans., 99; *Green's Brice's Ult. Vir.*, 372, note A; and *Water Co. vs. the City of Aurora*, 129 Mo., 584.

Baxter Springs vs. Light Co., 64 Kans., 598.

"The doctrine of *ultra vires* does not absolve municipal corporations from the principles of common honesty."

Bass Foundry & Machine Works vs. The Park County Commissioners, 150 Ind., 244.

"Where the contract is entered into in good faith between a corporation, public or private, and an individual person, and the contract is void in whole or part because of the want of power on a part of a corporation to make it or to enter into it, but the contract is not immoral, inequitable, or unjust, and the *contract is performed in whole and in part by and on the part of one of the parties, and the other party received benefit* by reason of such performance over and above any equivalent rendered in return, and such benefits are such as one party may lawfully render and the other party lawfully receive, the party receiving such benefits will be required to do equity towards the other party in *statu quo*, or by accounting to the other party for all benefits received for which no compensation has been rendered in return; and all this should be done as nearly in accordance with the terms of the contract as the law and equity will permit."

Brown vs. Atchison, 39 Kans., 54.

"There may be a difference between the case of an engagement made by a corporation to do an act expressly prohibited by its charter, or some other law, and a case of where legislative power to do the act has not been granted. Such a distinction is asserted in some decisions. But the present is not a case in which the issue of the bonds was prohibited by any statute. At most, the issue was unauthorized. At most, there was a defect of power. The promise to give bonds to the plaintiffs in payment of what they undertook to do was, therefore, at farthest, only *ultra vires;* and, in such a case, though specific performance of an engagement to do a thing transgressive of its corporate power may not be enforced, the corporation can be held liable on its contract. Having received benefits at the expense of the other contracting party, it cannot object that it was not empowered to perform what it promised in return, in the mode in which it promised to perform. This was directly ruled in *The State Board of Agriculture vs. The Citizens' Street-Railway Co.*, 47 Ind. 407. There it was held, that "although there may be a defect of power in a corporation to make a contract, yet if a contract made by it is not in violation of its charter, or of

any statute prohibiting it, and the corporation has by its promise induced a party relying on the promise and in execution of the contract to expend money and perform his part thereof, the corporation is liable on the contract. See also, substantially to the same effect, *Allegheny City vs. McClurkin*, 14 Pa. St., 81; and *Maher vs. Chicago*, 38 Ill., 266; *Oneida Bank vs. Ontario Bank*, 21 N. Y., 490; *Argenti vs. City of San Francisco*, 16 Cal., 256; *Silver Lake Bank vs. North*, 4 Johns. (N. Y.) Ch. 370."

Hitchcock vs. Galveston 96 U. S., 351.

II. *Practical construction.* If there were any fair doubt as to the exclusive right the city should be held to the practical construction which, in this respect, it has put upon its powers, upon which construction others have acted and advanced their money and who will suffer irreparable loss if the city is years afterwards permitted to repudiate its contract.

"Where the true construction of a charter admits of doubt, and the construction adopted by the city authorities has been acquiesced in generally, and acted upon by third persons in good faith, in their transactions with the city, it will be precluded by the courts in actions by such third parties from denying its construction to be the true one. Van Hostrup v. Madison City, 1 Wall. (U. S.), 291 (1863); Meyer v. Muscatine, *Ib.* 384, 391."

Dillon, Mun. Corp. (4th Ed.), § 94, p. 151.

"Even if the case had been doubtful, inasmuch as the city authorities have given this construction to the charter, and bonds have been issued and in the hands of *bona fide* purchasers for value, we should have felt bound to acquiesce in it." Van Hostrup vs. Madison City, 1 Wall., 291. As to holding municipality bound by the practical construction, see

Washington County vs. Williams, 111 Fed. Rep., 801.
Keith County vs. Citizens Sav. & Loan Assoc., 116 Fed. Rep., 12.
Wetzell vs. Paducah, 117 Fed. Rep., 647.
Schmitz vs. Zeh (Minn.), 97 N. W. Rep., 1049.
Washington County vs. David (Neb.), 89 N. W. Rep., 737.

Ordinance 402 Binds Appellant Company to Furnish Light at Reasonable Rates.

Ordinance 402 does not in express terms state the rates at which the City of Hutchinson or its inhabitants are to be supplied with gas. In this respect said ordinance is like the one in the *Walla Walla Case* but differs somewhat from the ordinance involved

in said case of *Vicksburg Water Works Company against Vicksburg* (see the Vicksburg ordinance, 185 U. S., 68, 69). In our opinion, however, the Court on principle ought not to hold that such difference ought to make any difference in the decision; for the Hutchinson Water, Light and Power Company by the acceptance of this ordinance became obligated to furnish light to the City of Hutchinson and its inhabitants at reasonable rates. The main point to be considered is that by the adoption of this ordinance 402 and its acceptance and fulfillment by the company, the City of Hutchinson made a contract by which the city and its inhabitants became entitled to a supply of light, and under the principles stated in said *Walla Walla* and *Vicksburg* cases it is our opinion that the City Council had the right and authority to *provide as an inducement to said company to furnish such supply of light that such company should have the exclusive right so to do for the term of twenty years.*

Appellees make the point that Ordinance 402 not only does not constitute, so far as relates to electric light and gas, *an exclusive contract but no contract whatsoever* (Appellees' Brief in No. 53, pp. 24-30).

The Appellees do not deny that Ordinance 402 was accepted as required by section 18. Nor do they deny that the Ordinance has been acted upon by both parties ever since and light furnished to the City and its inhabitants until 1905, when the City "ordered your orator absolutely to turn off and cease lighting the streets," and passed arbitrarily and without giving any reason therefor the repudiating Ordinances Nos. 651 and 661. In said Ordinances no complaint is made as to the quality or sufficiency of the light furnished by the Appellant Company or of any default whatsoever on the part of the Appellant. In this the City did indeed *extinguish the Appellant's light upon its streets*, but although so intended, it did not, as Appellant's contend, *extinguish their rights.*

The ground of appellee's contention that there was *no contract whatsoever* as to electric light and gas is (as stated in their said brief in No. 53 at p. 25) as follows:

"The ordinance nowhere either expressly or by implication imposes any duty or obligation whatever upon the appellant, with reference to electric current or gas. It contains no provisions that appellant shall furnish either to the City, or its inhabitants electric

current or gas at any time. The ordinance simply grants the right and privilege of providing electric lights and gas, without requiring that it shall be done, and without imposing upon appellant any duty or obligation in connection therewith. No lights are required to be furnished within a given time, nor is any price fixed in the event that lights are furnished. In other words the public has received no consideration for this grant so far as it relates to electric current or gas."

In these respects Ordinance 402 as to light and gas and the absence of provisions fixing rates is precisely like Ordinances 651 and 661 in favor of the appellee. These fix no rates and contain no express covenant to supply electric light and gas light.

The appellee's point that Ordinance 402 " nowhere either expressly or by implication imposes any duty or obligation whatever upon the appellant with reference to electricity or gas " is wholly unfounded. This duty or obligation is clearly imposed by the appellant's formal acceptance of the ordinance as required by the city and by the continuous action of the parties under it for years.

If the appellant should arbitrarily without cause shut off and refuse to furnish light to the city or its inhabitants would not any Court hold that the appellant was under a duty to furnish the light and enforce that duty by *mandamus ?* or if such refusal was persistent forfeit on *quo warranto* the corporate rights of the appellant Company as respects lighting franchises ? There were good reasons why the rates for light were not fixed in Ordinance 402 in March, 1897. The city had contracts with the appellant's assignors for light, having eight years or so to run. There was no necessity to fix in advance for 20 years the rates for light service. The law writes into every such contract when it is silent as to rates that they shall be reasonable.

Appellant does not have a Monopoly, Because its Charges for Service are Subject to Regulation by the City.

Further on the subject of the power of the city to regulate the charges of appellant for lighting service, as discussed on pages 51 and 52 of appellant's main brief, we call attention to the fact that over and beyond the power to regulate rates for municipal services exercisable under the general language contained in Sections 767 and 824, *supra*, and assuming that the municipal power of regulation did not exist in the lack of a statute expressly conferring it,

that lack was supplied by Session Laws of 1897, Chap. 82, Sec. 2, which reads :

"The municipal authorities of any city of the first, second or third class in this State in which any such private corporation now exists, and which may now or hereafter manufacture, sell or furnish gas light, electric light, electric power, water or heat to such city and its citizens, is hereby authorized to contract with any such corporation for the lighting of, and for supplying power, water or heat to public or private buildings and other places, and for all purposes necessary in any such city, and to *fix all charges therefor*, upon the conditions imposed in this act."

The power authorized by the above statute was continued, though expressed in somewhat different phraseology, in Session Laws of 1903, Chap. 136, Sec. 2, General Statutes 1905, Sec. 663, which reads :

"The mayor and city council of any city of the second or third class are hereby authorized to *contract for and fix rates for private consumers, for a period not exceeding twenty years*, with any person, company, or corporation, for supplying the city and its inhabitants with water for fire protection, or lighting, or supplying with water and light, the streets, alleys, parks, and city buildings, or furnishing water, heat, light or power for public or private use."

The first of above statutes took effect a few days after the passage of ordinance 402, and, though enacted after the date of the ordinance, it nevertheless vested a right of rate regulation in the municipal authorities as to all services performed under the ordinance not otherwise provided for. In *Freeport Water Co. v. City of Freeport*, 180 U. S. 587, and *Rogers Park Water Co. v. Fergus*, 180 U. S. 624, it was held that a municipal power of rate regulation existed unless contracted away, and that in order to contract it away clear statutory authority must exist.

So far as concerns the question of fixing in said ordinance 402 rates for the supply of electricity or gas, it is **better for the city that such rates should not in said ordinance be fixed once and for all for said term of twenty years,** but that such rates be fixed from time to time during said term as determined by both parties, or by the Courts, if necessary, to be fair and reasonable, all the facts existing from time to time, such as price of material and labor and cost of production, being considered in connection with the de-

termination of such rates. But the essential thing for the city was to obtain a supply of electricity and gas; and inasmuch as such supply involved an outlay of a large sum of money by the company, and the company would not be willing to make such outlay unless assured that for a reasonable length of time it could be able to dispose of its product and thus obtain a return on its investment of this large amount of money, it was competent, in order to induce the company to invest this large amount of money for the city to stipulate that the franchise should be exclusive for a term of twenty years. This was the reason for and ground of the decision by the Supreme Court of the United States in the *Vicksburg* case, and in our opinion is the essential principle involved, not the question as to whether the rates during such term shall have been fixed once for all at the beginning of the term.

THAT THE COMPANY CAME BY THE ACCEPTANCE OF THIS ORDINANCE 402 UNDER THE IMPLIED IF NOT EXPRESS OBLIGATION TO FURNISH A SUPPLY OF LIGHT to the city and its inhabitants at reasonable rates, see the case of *Des Moines Street Railroad Co. vs. Des Moines Broad Gauge Street Railroad Co.*, 73 Iowa, 513; also Encyclopedia of Law and Procedure, pages 1160, 1165, and the cases there cited.

A contract by a public-service company with a municipal corporation is never unilateral, nor lacking the element of mutuality. *This, for the reason that the incorporation of the company for the purpose of supplying municipal necessities, and its application for and acceptance of the municipal franchise to furnish such necessities, lays it under the obligation to furnish them,—implies an agreement by it to render the services, and it therefore needs no express engagement on its part to do that for which it was incorporated and to perform which, in the particular municipality, it asked for and was granted permission.* This subject is elaborately and ably discussed in the case of *Hangen vs. Albina Light & Water Co.*, 21 Oregon, 411, 14 L. R. A., 424. This decision reviews nearly every case on the question and shows that the authorities are unanimous in support of the rule as we have stated it.

We submit that the decree below ought to be reversed.

JOHN F. DILLON,
HARRY HUBBARD,
FRANK DOSTER,
HOUSTON WHITESIDE,
HOWARD S. LEWIS,
For Appellant.

IN THE

SUPREME COURT

OF THE

UNITED STATES.

THE WATER, LIGHT & GAS COMPANY, *Appellant.*	File No. 20,288
vs.	
THE CITY OF HUTCHINSON, et al., *Appellees.*	Term No. 53

BRIEF AND ARGUMENT OF APPELLEES.

This case appears before this Honorable Court on an appeal from a judgment of the circuit court within and for the district of Kansas, sustaining a demurrer to the amended bill of complaint filed by The Water, Light & Gas Company in said circuit court. And the question to be determined is, was there error in sustaining said demurrer? The bill of complaint alleged among other things, that the defendant

City of Hutchinson was, at all times mentioned in said bill, a city of the second class, under the laws of the State of Kansas, and that the mayor and council of said city, by ordinance numbered 402, passed and approved March 5th, 1897, granted to complainant's assignor what is claimed by it to be the exclusive right and privilege, for the term of twenty years from the date of the passage and approval of this ordinance of supplying the said City of Hutchinson and its inhabitants by a system of water works with water for the prevention and extinguishment of fires and for all other purposes for which water may be used; with electric current for electric light and power, and for all other purposes for which electric current may be used, except power for the operation of street railways; and with gas for lighting, heating and for fuel, and for all other purposes for which gas may be used.

The bill of complaint also shows that on the 15th day of December, 1905, the mayor and council of said defendant City of Hutchinson duly passed, approved and published ordinance numbered 651, granting to the appellees, E. Carey, K. E. Sentney, C. M. Williams, C. H. McBurney, A. W. Smith and J. S. George, their successors and assigns, certain rights and privileges of constructing and operating a line of street railway in said city, and of furnishing said city and its inhabitants with electric light and gas for light, power and heating purposes; that this latter ordinance or grant was made within the life of the fanchise of appellant. Appellant's action was to enjoin and restrain the appellee city, its mayor and council and the appellees

named by the terms of ordinance numbered 651, from in any way proceeding under the terms of this ordinance to furnish any public service which appellant might provide under the terms of ordinance numbered 402, upon the ground that the furnishing of the same by the appellees would interfere with the exclusive right of the appellant for the time therein mentioned of twenty years, which time had not expired.

On the demurrer filed by the appellees two questions are presented.

First.—Did the City of Hutchinson by ordinance numbered 402 grant or attempt to grant, to the corporation therein named, the exclusive right and privilege of furnishing the city and its inhabitants with electric light and gas for heating, light and fuel?

Second.—If ordinance numbered 402 did grant unto the corporation therein named the exclusive right, as by it claimed, of furnishing the city and its inhabitants with electric light, and gas for heating, light and fuel, then did the City of Hutchinson possess the power inherent, or under the law of its creation to make an *exclusive* contract binding itself and inhabitants to receive and pay for water, light, heat and power, from the corporation therein named for the period of twenty years to the exclusion of all others?

This demurrer was argued to Honorable John C. Pollock, who presided as the judge of the lower court, upon these two propositions, and Judge Pollock sustained said demurrer upon the second proposition that the City of Hutchinson in the State of

Kansas, being a city of the second class in said state, had no power to grant an exclusive privilege or franchise to the complainant.

Inasmuch as the memorandum of the decision by Judge Pollock, which appears in the record at pp. 52-63, is so sound, pointed and able as to be a complete exposition of the law upon this proposition, and is so well fortified by authorities of the highest repute; for the convenience of this Honorable Court, we shall incorporate it verbatim into this brief, recognizing and admitting our inability to amplify upon the argument contained therein without detracting from its compelling force. It is as follows:

"As shown by the bill of complaint presented, defendant, the City of Hutchinson, a city of the second class under the laws of this State, by ordinance numbered 402 of that city, duly passed and approved March 5, 1897, and thereafter duly published, upon sufficient consideration entered into a contract with The Hutchinson Water, Light and Power Company, a domestic corporation of this State, to supply said city and its inhabitants with water and light for a period of twenty years. Said contract, as shown from the terms of the ordinance, was a compromise and adjustment of rights arising between the parties under the terms of prior contracts theretofore entered into and then exisiting. The preamble to and so much of said ordinance numbered 402 as is deemed material to the consideration of the controversy now arising for decision, reads as follows:

"An ordinance to provide for a system of water works, electric light works and gas works, and supply of water, electric current and gas to the City of Hutchinson and the inhabitants thereof.

"Whereas, The Hutchinson, Water Light and Power Company is the owner of certain exclusive franchises and contracts with the City of Hutchin-

son, under which and in accordance with which the said company has expended large sums of money in constructing and building water works, electric light works and gas works, and in building up the business of said works, which are now in successful operation in supplying the City of Hutchinson and the inhabitants thereof with water, electric current and gas for all purposes for which water, electric current and gas are used, and

"Whereas, The City of Hutchinson is desirous of modifying and changing said franchise and contracts to the advantage of said City of Hutchinson without cancelling or abridging any of the rights or privileges vested in said company by reason of its labor and investments under said franchises and contracts other than the modifications hereinafter specfied.

"Therefore, In consideration of the surrender of all the existing contracts and franchises of said company with the City of Hutchinson, excepting as hereinafter specified.

"Be it ordained by the mayor and council of the City of Hutchinson, Kansas:

"Section 1. That there is hereby given and granted to The Hutchinson Water, Light and Power Company, of Hutchinson, Kansas, its successors or assigns; the exclusive right and privileges for the term of twenty years from the date of the passage and approval of this ordinance of supplying the City of Hutchinson, Reno county, Kansas, and the inhabitants thereof, by a system of works with water for the prevention and extinguishment of fires and for all other purposes for which water may be used, (said water works to be the Holly system); with electric current for electric light and power, and for all other purposes for which elertric current may be used, except power for the operation of street railways, which exception shall not prevent said Water, Light and Power Company from furnishing electric currents to street railways for any and all purposes; and with gas for lighting, heating and for fuel, and for all other purposes for which gas may

be used, in accordance with the terms and conditions set forth in this ordinance."

"Section 2. That said Hutchinson Water, Light and Power Company, it snccessors or assigns, is hereby authorized to maintain, extend and operate said works in or adjacent to the City of Hutchinson to receive, take, store, purify, conduct and distribute said water, electric current and gas through said city, to construct and extend aqueducts, mains, pipes and erect poles and wires through all the streets, alleys, lanes and public grounds and to cross any stream or bridge in said city, to erect and maintain all engines, machinery and other appliances necessary for conducting any of said works, and for supplying said city and the inhabitants thereof with water, electric current and gas for the purposes herein mentioned, and for such purposes the said Hutchinson Water, Light and Power Company, its successors or assigns, shall have the right, and is hereby authorized to use the streets, alleys, avenues, lanes and public grounds, in or adjacent to said city, and shall have the right to take up any pavements or sidswalks, and make such excavations therein as may be necessary to lay, repair and maintain aqueducts, mains and pipes below the surface of the ground for conveying and distributing the water and gas, and for erecting poles for electric wires as aforesaid;

"Section 4. The said City of Hutchinson hereby agrees to rent, and does rent for fire protection, the one hundred and eighty-five (185) fire hydrands now located on the mains of the said water works from The Hutchinson Water, Light and Power Company, its successors or assigns, for the full term of this contract, and the said City of Hutchinson will pay for the use of said one hundred and eighty-five (185) hydrants an annual rent of $6,000, payable semi-annually of the first days of May and November of each year, less $1,000 per year rebate for two years from the passage of this ordinance, payments to be made as hereinafter specified. For all hydrants located on extensions hereafter ordered by the city council, as specified in section 3 of this ordinance

the City of Hutchinson agrees to pay thirty-six dollars ($36.00) per annum for each hydrant so located, payments to be made as hereinafter specified. The said Hutchinson Water, Light and Power Company shall furnish water for sprinkling the streets of the City of Hutchincon at the rate of $12.50 per month for each wagon or sprinkler used in sprinkling said streets for one year from and after the date of the passage and approval of this ordinance, and for the next succeeding year, or second year after the passage and approval of this ordinance, the said Hutchinson Water, Light and Power Company shall furnish water for such street sprinkling purpose at the rate of $15.00 per month, for each wagon or sprinkler used in sprinkling said streets.

"Section 8. The City of Hutchinson shall have the right to purchase the works, property and business created, acquired, constructed and contemplated under this contract at any time after the expiration of ten years from the adoption of this ordinance, upon giving one year's notice to the owners of said property and upon paying to said owners a fair value for the same as may be mutually agreed, or fixed by a court of competent jurisdiction. Said one year's notice may be given at any time after the expiration of nine years from the date of the passage and approval of this ordinance.

"Section 13. The City of Hutchinson hereby agrees that it will pass all necessary ordinances for the protection of the property of the said water works, electric light works and gas works, to prevent the contamination of the water supply, to prevent the waste of water from the hydrants, mains and pipes, to prevent all interference with its poles and wires, and that it will upon request of the said Hutchinson Water, Light and Power Company, its successors or assigns, proceed without delay to exercise its rights under the statutes of the State of Kansas, in the matter of the condemnation of any lot, parcel or piece of ground, or of water, or water privileges that may be necessary to the proper and convenient construction, maintenance and operation

of the system of water, gas and electric light works contemplated in this ordinance.

"Provided, That the said Hutchinson Water, Light and Power Company, its successor or assigns, pay all costs and expense incident thereto, including the cost of all property so condemned, and

"Provided, further, That the right to free and exclusive control of all property so condemned shall rest and remain in the said Hutchinson Water, Light and Power Company, its successors or assigns.

"Section 14. If the said Hutchinson Water, Light and Power Company, its successors or assigns, shall refuse to operate the water system contemplated in this ordinance at any time, that part of this franchise relating to the water system shall be forfeited, unless such failure to operate is unavoidable or due to accident.

"Section 15. Nothing in this ordinance shall prevent any person or company from manufacturing gas, electricity or any other material for his own or their own use for light or fuel, but in no case shall such person supply others with gas or electric current for any purpose.'"

Thereafter, complainant in this suit a corporation of New Jersey, by purchase became and now is the lawful successor in right of all the property, franchises and rights of the domestic contracting company. On the 15th day of December, 1905, the defendant City of Hutchinson duly passed an ordinance numbered 651 of the city, contracting with and granting unto defendants Emerson Carey, K. E. Sentney, C. M. Williams, C. H. McBurney, A. W. Smith and J. S. George, their successors and assigns, certain rights and privileges of constructing and operating a line of street railway in said city and of furnishing said city and its inhabitants with electric light and gas for light, power and heating purposes. So much of said ordinance as is deemed material here reads as follows:

"An ordinance granting permission and authority to Emerson Carey, K. E. Sentney, C. M. Williams, C. H. McBurney, A. W. Smith and J. S. George, their

successors or assigns, to construct and operate a street railway in and along the streets and avenues of the City of Hutchinson, Reno county, Kansas, and to construct, operate and maintain an electric plant for the purpose of furnishing electric current for electric lights and power and for all other purposes for which electric current may be used, and to construct, operate and maintain a gas plant for heating, lighting and fuel and for all other purposes for which gas may be used and prescribing certain regulations and relations thereto.

"Be it ordained by the mayor and council of the City of Hutchinson, Kansas.

"Section 1. That consent, permission and authority are hereby given and granted to Emerson Carey, K. E. Sentney, C. M. Williams, C. H. McBurney, A. W. Smith and J. S. George, their successors or assigns, to construct, run and operate for a period of fifty years from and after the publication of this ordinance a single or double track street railway, with all necessary side tracks, turnouts, switches and curves in and along the streets and avenues mentioned in section 12 of this ordinance and upon such other streets and avenues of said city for which the city council may hereafter grant permission, or where the owners of a majority of the front footage between the terminal points of the tracks upon such streets and avenues shall consent in writing to this council to the construction and operation of a street railway thereon and to keep, maintain and operate thereon street railway cars and carriages in the manner and in accordance with the conditions and provisions hereinafter set forth.

"Sec. 21. There is hereby given and granted to the said Emerson Carey, K. E. Sentney, C. M. Williams, C. H. McBurney, A. W. Smith and J. S. George in connection with the privileges and rights conferred in the above and foregoing sections, the further right and privilege for the term of twenty years from the date of the passage and approval of this ordinance of supplying the City of Hutchinson, Reno county, and the inhabitants of said city and

county with electric current for electric light and power and for all other purposes for which electric current may be used and for such purpose said grantees are here authorized and permitted to erect poles and wires through all the streets, alleys, lanes and public grounds and to cross any stream or bridge in said city to erect and maintain all engines, machinery and other appliances necessary for the conducting of said work, and for the supplying of said city, said Reno county and the inhabitants of said city and county with electric light and power.

"Sec. 22. The said grantees herein, their successors or assigns, shall not at any time use the poles, wire and other appliances provided for in this ordinance in such a manner as to hinder or obstruct the commerce or trade of the City of Hutchinson, nor obstruct the proper use of the streets, alleys, lanes, avenues, public grounds or other public places excepting as may be necessary temporarily to make repairs; or extensions or improvements to its property and works.

"Sec. 23. That in addition to the rights and privileges heretofore granted, there is granted to said Emerson Carey, K. E. Sentney, C. M. Williams, C. H. McBurney, A. W. Smith and J. S George, their successors and assigns, the further right and privilege for the term of twenty years from the date of the passage and approving of this ordinance of supplying the City of Hutchinson, Reno county, Kansas, and the inhabitants thereof with gas, either manufactured or natural and for such purpose shall have the right and privilege to construct and maintain mains, pipes and other conduits in the streets and alleys of said city.

"Sec. 28. The City of Hutchinson hereby agrees that it will pass all necessary ordinances for the protection of the property of the said grantees herein, their successors and assigns for their street railway and its machinery, electric works and gas works, and to prevent interference with the poles and wires, or the convenient construction, maintenance and operation of the same.'"

This suit was brought to enjoin and restrain the defendent city, its mayor and council, and the persons named contracting with the defendant city by the terms of ordinance number 651, from in any way proceeding under the terms of said ordinance toward the doing of any public service which complainant might do under the terms of ordinance number 402, upon the ground that complainant has the exclusive right for the period of time mentioned therein, twenty years, which time has not expired, to furnish such public service to the city and inhabitants thereof. The prayer of the bill reads:

"'That a writ of injunction be issued commanding the defendants and all persons claiming to act under their authority and direction to refrain and desist from doing any acts or exercising any pretenses of right to act under the aforesaid ordinance number 651 granted to defendants as aforesaid which will in any wise affect the exclusive rights of your orator to furnish the said city and its inhabitants with electric or gas light for lighting and heating purposes or power except for street cars and electric railways, and also from making or proceeding to make any contract for furnishing light or gas to said city and its inhabitants until the expiration of the aforesaid franchises and contracts of your orator with said city.'"

Defendants have appeared to this bill and demur for want of equity.

The questions arising for determination are: (1) Did the city, by ordinance number 402, grant or attempt to grant unto the corporation therein named the exclusive right for the period of time therein named of furnishing the city and its inhabitants with electric light and gas for heating, light and fuel, such period of time not having expired: (2) if so, did the city possess the power inherent or under the law of its creation to make an *exclusive* contract binding itself and inhabitants to receive and pay for water, light, heat and power from the corporation there contracted with for the period of twenty years to the exclusion of all others?

If these questions are answered in the affirmative, then it is clear the demurrer must be overruled and complainant may maintain the suit to protect its franchises and contract rights from violation at the hands of the defendants.

Jersey City Gas Co. vs. Dwight, 29 N. J. Eq., 242.
City of Newport vs. Newport Light Co., 84 Ky., 166.

While the exclusive right of complainant to furnish the defendant city with water under its franchise is not here challenged, and while complainant by the terms of ordinance number 402 does not obligate itself to the city to furnish, light, heat or power, yet, assuming for the purpose of decision the contract made by ordinance number 402 between the defendant city and complainant as successor of The Hutchinson Water, Light and Power Company, is in terms exclusive, and was intended to be so by the city at the time it was made the important and principal inquiry still remains, did the city at the time the ordinance was passed possess the power to make a contract binding and exclusive of all others for the period of twenty years. If so, it follows, of necessity, the demurrer must be overruled. If not, it should be sustained, for the sole purpose of this suit, as has been seen, is to nullify the action of the city in the making of the subsequent contract upon the one ground alone of the exclusive character of the former grant.

In the light of authority it must be conceded the power to make the exclusive contract contended for by complainant resides in the state and may be delegated by it to municipal agent, such as the defendant city, and when delegated, the city becomes possessed of the power by contract to exclude not only other persons and corporations thereafter desiring to contract with it for the performance of a public service for a given period of time, but also to obligate itself during such term not to undertake the performance of such public service, and such

contract rights will receive protection from the courts under the federal constitution.

Walla Walla vs. Walla Walla Water Co., 172 U. S. 1.

It therefore becomes important in this inquiry to determine first of all, the precise power inherent in or conferred upon the defendant city to contract with The Hutchinson Light and Power Company.

The defendant city as a municipal corporation of this state is purely a creation of statutory law. Our constitution recognizes but does not confer any power upon cities of the state. Section 5, article 12, provides:

"'Provision shall be made by general law for the organization of cities, towns and villages; and their power of taxation, assessment, borrowing money, contracting debts and loaning their credit, shall be so restricted as to prevent the abuse of such power.'"

As the full measure of power reserved by the state, unsurrendered to the general government upon its admission into the Union, remains in and can be exercised alone by the state, except as such power has been by the legislature of the state delegated to its municipal corporations and other agents, as a necessary and inevitable sequence it must follow, there is no inherent power in the defendant city to make the contract claimed. *Citizens' St. Railway vs. Detroit Railway, 171 U. S., 48.* And as the organic law of the state confers no power upon the cities of the state, but merely empowers the legislative branch of the state to organize cities under general laws and to restrict their powers, the power of the defendant city to make the exclusive contract claimed by complainant to exist must be found, if at all, either in the charter of the contracting company or in the provisions of the second class cities' act of this state, in force at the time of the passage of the ordinance, for this act is the organic law of the city.

What was the measure of power conferred upon the corporation and the city, and how must the stat-

utory law granting such power be construed by the courts. The contracting company having been created under the general incorporation laws of the state did have the power "'To enter into any obligation or contract essential to the transaction of its ordinary affairs.'" Sec. 25, Chap. 23, Art. 3, Gen. Stat. 1901. While this grant of power, might suffice to enable the company to enter into an exclusive contract with the city, it is not contended, and cannot be contended, it conferred any such power upon the city to so contract. Hence, the power claimed to have been conferred upon the city must be found, if it exists, in the organic law of the city, that is, in the second class cities' act, and such amendments thereto as were in force at the date of the making of the contract in question.

Looking now to this act we find the following statutory provisions bearing upon this question. Section 35 of the act provided the general powers of the mayor and council of such city, and reads as follows:

"'The mayor and council of each city governed by this act shall have the care, management and control of the city, and its finances, and shall have power to enact, ordain, alter or repeal any and all ordinances not repugnant to the constitution and laws of this state, and such as it shall deem expedient for the good government of the city, the preservation of the peace and good order, the suppression of vice and immorality, the benefit of trade and commerce, and the health of the inhabitants thereof, and such other ordinances, rules and regulations as may be necessary to carry such power into effect.'"

Section 65 of the act provides:

"'The council may provide for and regulate the lighting of the streets, and the erection of lamp posts, and the numbering of the buildings in the city, and the construction of sewers; and the council shall have power to make contracts with any person, company or association for such purposes, and give such person, company or association the privilege of

furnishing light for the streets, lanes or alleys of said city for any length of time not exceeding twenty-one years.'"

Section 83 of the act provides:

"'That cities of the second class of the State of Kansas are hereby granted full power and authority, on behalf of said cities to purchase, procure, provide and contract for the construction of and construct water works, electric light and gas plants, for the purpose of supplying such cities and the inhabitants thereof with water, light and gas for domestic use and any and all other purposes.'"

Judge Dillon in his work on Municipal Corporations, 4th Ed., section 89, says:

"'It is a general and undisputed proposition of law that a municipal corporation possesses and can exercise the following powers, and no others: 1. Those granted in express words; 2. Those necessarily or fairly implied in or incident to the powers expressly granted; 3. Those essential to the declared objects and purposes of the corporation,—not simply convenient, but indispensable. Any fair, reasonable doubt concerning the existence of the power is resolved by the courts against the corporation, and the power is denied. Of every municipal corporation the charter or statute by which it is created is its organic act. Neither the corporation nor its officers can do any act, or make any contract, or incur any liability, not authorized thereby, or by some legislative act applicable thereto. All acts beyond the scope of the powers granted are void.'"

In *Minturn vs. Larue et al., 23 How., 435*, Mr. Justice Nelson delivering the opinion of the court, says:

"'It is a well settled rule of construction of grants by the legislature to corporations, whether public or private, that only such powers and rights can be exercised under them as are clearly comprehended within the words of the act or derived therefrom by necessary implication, regard being had to the objects of the grant. Any ambiguity of doubt

arising out of the terms used by the legislature must be resolved in favor of the public.'"

Judge Jackson in *Grand Rapids E. L. & P. Co. vs. Grand Rapids E. E. L. & F. G. Co., 33 Fed., 659*, says:

"'To confer *exclusive* rights and privileges, either in the street of a city or in the public highways, *necessarily involves the assertion and exercise of exclusive powers and control over the same.* Nothing short of the *whole sovereign power* of the state can confer *exclusive* rights and privileges in public streets, dedicated or acquired for *public* use, and which are held in *trust* for the *public at large.* This brings us directly up to the inquiry whether the legislature of Michigan has delegated to the city of Grand Rapids the state's sovereign power and control over the streets of that municipalty. If the charter powers of the city have invested it or its common council with the *whole sovereign* power and exclusive control over the streets within its limits, it might lawfully confer upon the complainant the exclusive right of user, which the ordinance of 1880 undertook to grant. If, however, the city or its common council possessed no such exclusive power and control, the grant which it attempted to make to complainant was *ultra vires*, and therefore void, so far as it purports to confer exclusive privileges in or over the streets of the city.'"

Mr. Justice McKenna, delivering the opinion of the court in *Citizens' St. Railway vs. Detroit Railway 171 U. S., 48*, says:

"'It is clear that the statute did not explicitly and directly confer the power on the municipality to grant an exclusive privilege to occupy its streets for railway purposes. It is urged, however, that such power is to be inferred from the provision which requires the consent of the municipal authorities to the construction of a railway under such terms as they may prescribe, combined with the provisions of the constitution, which, if they do not confer a power independent of the legislature, strongly provide for

and intend local government. The argument is strong, and all of its strength has been presented and is appreciated, but there exist considerations of countervailing and superior strength. That such power must be given in language explicit and express, or necessarily to be implied from other powers, is now firmly fixed. There were many reasons which urged to this—reasons which flow from the nature of the municipal trust—even from the nature of the legislative trust, and those which, without the clearest intention explicitely declared, insistently forbid that the future should be committed and bound by the conditions of the present time, and functions delegated for public purposes be paralized in their exercise by the existence of exclusive privileges. The rule and the reason for it are expressed in *Minturn vs. Larue, 23, How., 435. Wright vs. Nagle, 101 U. S., 791; State vs. Cincinatti Gas Light and Coke Co., 18 Ohio St., 262; Parkhurst vs. Salem, 32 Pac. Rep., 304; Saginaw Gas Light Co. vs Saginaw, 28 Fed. Rep., 529*, decided by Mr. Justice Brown of this court; *Long vs. Duluth, 51 N. W. Rep. 913.* See also *Grand Rapids Electric Light and Power Co. vs. Grand Rapids, &c. Co., 33 Fed. Rep., 659*, opinion delivered by Mr. Justice Jackson at circuit. As bearing on the rule; see also *Oregon Railway & Navigation Co. vs. Oregonian Railway Co., 130 U. S. 1; Central Transportation Co. vs. Pullman Palace Car Co., 139 U. S. 24.*

The power, therefore, must be granted in express words or necessarily to be implied. What does the latter mean? Mr. Justice Jackson, in *Grand Rapids, &c. Power Co. vs. Grand Rapids &c., supra says:* * * * " 'that municipal corporations possess and can exercise only such powers as are 'granted in *express words*, or those *necessarily* or *fairly* implied, *in or incident to the powers expressly conferred, or those essential to the declared objects and purposes of the corporation, not simply convenient, but indispensable.*' "

Mr. Justice Brewer, delivering the opinion of the court in *Jackson County Horse R. Co. vs. Interstate Rapid Transit Ry. Co., 24 Fed. 307*, says:

" 'The precise question is, had the City of Kansas the power to grant for a term of years the exclusive right to occupy its streets with street railroads? That question must be answered in the negative. Let me in the outset formulate two or three unquestioned propositions: (1) The legislature has, as the general representative of the public, the power, subject to specific constitutional limitations to grant special privileges; (2) it may, with similar limitations, grant the like power to municipal corporations as to all matters of a purely municipal nature; but, (3) as the possession by one individual of a privilege not open to acquisition by others apparently conflicts with that equality of rights which is the underlying principal of social organization and popular government, he who claims such exclusive privilege must show clear warrant of title, if not also probable corresponding benefit to the public. Hence the familiar rule that charters, grants of franchises, privileges, etc., are to be construed in favor of the government. Doubts as to what is granted are resolved in favor of the grantor, or as often epigrammatically said, a doubt destroys a grant.' "

Judge Sanborn, in the case of the *Illinois Trust & Sav. Bank vs. City of Arkansas City, 22 C. C. A., 179*, says:

" 'The general rule is that the legislature alone has the power to make exclusive grants of this character, and that this authority does not vest in the municipality, unless it is expressly granted to it by its charter. It will be further conceded that, if a grant of a similar privilege in its streets, not exclusive, has been subsequently made by this city, to another corporation, and that corporation was about to proceed to construct another system of water works in this city, neither the gas company nor the city itself could maintain a bill to enjoin such proceedings. Since it was beyond the power of the city to make the grant of the privilege exclusive, that portion of the grant would not sustain a bill to restrain the violation of its terms.' "

In the exercise of the sovereign reserved power possessed by the state under the constitution, state legislatures have in many cases granted exclusive rights, franchises and privileges, and such grants have been upheld and enforced as exclusive. *New Orleans Gas Co. vs. Louisiana Light Co., 115 U. S., 650; New Orleans Waterworks Co. vs. River, id. 674; Louisville Gas Co. vs. Citizens' Gas Co., id. 683; Tammany Waterworks vs. N. O. Waterworks, 120 U. S., 64.* But it is quite clear from a consideration of the fundamental principles of government and an examination of the adjudicated cases, defendant city under our constitution possessed neither the inherent power to make the exclusive contract claimed by complainant, nor did the legislature of the state confer, or attempt fo confer upon it, such plenary power, under the statutory provisions quoted, from the organic law of the city. Before the contention of complainant in this suit to the exclusive right claimed may be upheld, it must appear the legislature of the state, in express terms, or by necessary and inevitable implication, delegated to defendant city such sovereign and plenary power as once exercised by it exhausted the power to further contract in that regard during the life of the grant. This, as has been seen, it did not do. There are cases in actual or apparent conflict with the view here expressed, notably, *City of Newport vs. The Newport Light Company et al., 84 Ky., 166.* This case, however, was reviewed by Judge Brown at the circuit in *Saginaw Gas Light Co. vs. City of Saginaw, 28 Fed., 529*, and its reasoning disapproved. It is in conflict with the very great weight of authority and its argument is inconclusive.

Again it is thought by solicitors for complainant in this suit that the recent case of *California Reduction Co. vs. Sanitary Reduction Works*, decided by the Supreme Court, November 27, 1905, is authority for the position taken by complainant here. In that case the supervisors of the city of San Francisco by ordinance granted to one F. E. Sharon, his associates and assigns the exclusive right for a term

of fifty years to handle and reduce the garbage and refuse of that city. This grant was upheld and defendants assuming to act under a subsequent grant made by the city were enjoined. From an examination of that case it is seen section 11 of article 11 of the constitution of that state provides:

"'Any county, city, town or township may make and enforce within its limits all such local police, sanitary and other regulations as are not in conflict with general laws.'"

By virtue of this provision of the organic law of the state the full sovereign power with relation to the subject matter of the grant was delegated to the city of San Francisco to be exercised in such manner as in the judgment of the supervisors of the city might seem proper, except in so far as any attempt to exercise the power conferred might conflict with the general laws of the state. The holding was, the power exercised by the city in the making of the grant in question was not prohibited by the general laws of the state, hence, valid. To distinguish, there, the city possesses plenary power derived from the organic law of the state over the subject matter of the grant, except as its attempted exercise came in conflict with the general laws of the state. Here the organic law of the state confers no power upon the city, and the city can exercise no power not expressly or by necessary implication granted to it by the legislature.

This view of the controversy renders unnecesary a decision of the other question arising in the case, for it is apparent if the city had no power to grant the exclusive right claimed by complainant, such right if granted in terms would be void as to its exclusive feature, and would afford complainant no right to enjoin the further exercise of the power conferred upon the city.

It follows the demurrer must be sustained.

It is so ordered.

JOHN C. POLLOCK, Judge.

Topeka, January 27, 1906."

Since the rendition of the above opinion by his Honor, Judge Pollock, this Honorable Court has had before it and decided the case of *Vicksburg vs. Vicksburg Water Company, 26th Sup. Ct., 660.* The opinion in this case, however, in no way conflicts with the opinion rendered by Judge Pollock. In the Vicksburg case this Honorable Court did not decide the question at issue in the case at bar. In the Vicksburg case an exclusive water franchise was granted, carrying with it a contract with the company for a period of years. The city of Vicksburg attempted to construct works of its own. This Honorable Court did not hold that the city could lawfully grant an exclusive franchise of this character to a corporation so as to prevent the city from making a like grant to others, but, on the contrary, expressly refused to decide this point. What this Honorable Court held in this case, was, that the city of Vicksburg might exclude itself as a municipality from competition with the water company, and that the granting of a franchise which was in terms exclusive would be held to amount to an agreement on its part not to compete with the company during the period of the franchise. The Court, all through the Vickburg case, makes a distinction between the right of the city to grant a franchise excluding itself, and an exclusive franchise as to third parties, and its reason is set out at page 470 of the opinion, wherein the Court says:

"It needs no argument to demonstrate as is pointed out in the Walla Walla case, that the com-

petition of the city may be far more destructive than that of a private company. The city may conduct the business without regard to the profit to be gained as it may resort to taxation to make up the losses. The private company would be compelled to meet the grantee upon different terms and would not likely conduct the business unless it could be made profitable."

The Vicksburg decision is but a reiteration of the doctrine announced in the *Walla Walla case, 172 U. S., page 1*, which case was before his Honor, Judge Pollock, and the distinction between that case and the case at bar by him recognized.

Judge Pollock, as before stated, sustained the demurrer of appellees upon the proposition that cities of the second class in the State of Kansas had no inherent power, and the legislature of said state had not delegated to such cities the power to grant exclusive franchises.

This decision is cited with approval in sections 163 and 254A of Vol. 1, of Joyce on Electric Law, 2nd Edition, a late and most excellent authority, which sections read, in part, as follows:

Sec. 163. "A city charter will give it no rights other than those expressly or by necessary implication conferred, and courts are not disposed to extend or enlarge the powers of municipalities by implication, but have generally as a rule applied to their charter powers the same strict construction as in case of private corporations, and the presumption exists that the state has expressly, in terms, granted all that it designed to grant, and ambiguities will be resolved in favor of the public. * * * Therefore a city which is invested with no exclusive rights, franchises or privileges cannot confer exclusive

privileges upon one electric light company in the use of its streets.

Sec. 254A. "The power to make an exclusive contract for electric lighting resides in the state, and where the state constitution confers no such power upon its cities, but merely empowers the legislative branch of the state to organize cities under general laws and to restrict their powers, a city which has no delegation of power for that purpose, either expressely or by implication, cannot by contract grant an exclusive right for a term of years to a corporation to supply electricity to a city and occupy the city's streets for that purpose so as to prevent the city from contracting with others for such supply or from further exercising its powers in that respect."

See also sections 164 and 371 of the same volume.

But there is still another proposition that was not presented to Judge Pollock, and that is, admitting that the legislature of the State of Kansas had power to grant exclusive franchises, did it have the right under the Kansas constitution to delegate such power?

We call the attention of this Honorable Court to section 2 of the bill of rights in the Kansas constitution as follows:

"Section 2. All political power is inherent in the people and all free governments are founded on their authority and are instituted for their equal protection and benefit. No special privilege or immunities shall ever be granted by the legislature which may not be altered, revoked or repealed by the same body; and this power shall be exercised by no other tribunal or agency."

This section of the bill of rights has been reviewed by the Supreme Court of the State of Kansas in the case of *In re* M. E. Lowe for a writ of *habeas corpus* reported in the 54th Kansas Report at page 57. The Court uses this language:

"This section of the bill of rights clearly prohibits the legislature from delegating the power to a city to grant to any individual the special privilege of carrying on any business or calling."

Under this construction by the Supreme Court of the State of Kansas the legislature had no power to delegate to cities of the second class in said state the authority to grant exclusive franchises.

And if this construction is to be followed it is conclusive of the question that cities of the second class in the State of Kansas could not grant an exclusive franchise.

II.

DID THE DEFENDANT CITY, BY ORDINANCE NUMBERED 402, GRANT IN TERMS, OR ATTEMPT OR INTEND TO GRANT TO APPELLANT THE EXCLUSIVE RIGHT, FOR THE PERIOD OF TIME THEREIN NAMED, OF FURNISHING THE CITY AND ITS INHABITANTS WITH ELECTRIC LIGHT AND GAS?

It will be noticed that ordinance numbered 651, which it is contended, conflicts with the contractual rights of appellant under ordinance numbered 402, grants to the appellees, Carey, Sentney, Williams, McBurney, Smith and George the right and privilege

only, of supplying the city and its inhabitants with electric current, and with natural and artificial gas; it in no way attempts to interfere with the franchise rights of appellant to operate water works or supply the appellee city and its inhabitants with water.

It will be noticed that while ordinance numbered 402, under which appellant claims its exclusive rights and privileges, provides for the kind and number of fire hydrants the city shall rent, the price which it shall pay for the use of the same, the amount of money the city shall pay for water for sprinkling streets and for flushing sewers, and provides that the water company shall furnish water to the inhabitants of said city along the line of its mains and pipes, and fixes the price the inhabitants shall pay for the same, and goes into detail with reference to the duties and obligations to be performed by the water company, the ordinance nowhere either expressly or by implication imposes any duty or obligation whatever upon the appellant, with reference to electric current, or gas. It contains no provisions that appellant shall furnish either to the city, or its inhabitants electric current, or gas at any time. The ordinance simply grants the right and privilege of providing electric lights and gas, without requiring that it shall be done, and without imposing upon appellant any duty or obligation in connection therewith. No lights are required to be furnished within a given time, nor is any price fixed in the event that lights are furnished. In other words the public has received no consideration for this grant so far as it re-

lates to electric current or gas. In the case of *Jackson County Horse Ry. Co. vs. Interstate Rapid Transit Ry. Co., 24 Fed., 307*, the following quotation, from the opinion of Justice Brewer, seems to strongly indicate the necessity of a consideration moving to the public: "As the possession by one individual of a privilege not open to acquisition by others apparently conflicts with that equality of rights which is the underlying principal of social organization and popular government, he who claims such exclusive privilege must show clear warrant of title, *if not also probable corresponding benefit to the public.*" (The italics are ours.)

Mr. Abbott in his work on Municipal Corporations, Vol. 3, section 928, says:

"It is settled by the authorities and principals given in the preceding sections that a grant of an exclusive legal privilege is a contract, the obligations of which cannot, therefore be broken by the public corporation, or the one to whom the privilege or license has been given. They extend ordinarily, over a considerable period of time, and the essential of the right in favor of the licensee or grantee is the exclusive privilege of selling some commodity, or supplying some service at an agreed rate to the members of a community, the public corporation itself, or both."

The same authority says in section 926:

"The courts do not regard with favor grants for the exclusive occupation and use of public highways, or contracts for the exclusive sale to the public of a particular commodity. The rule of strict construction, therefore applies to all grants, licenses or contracts of this character, and unless a right claimed, clearly appears, its existance will be denied. This

rule will apply, not only to the existence of the exclusive privilege or contract itself, but also to any of the minor details or conditions of the instrument. An exclusive franchise in case of doubt, to state the rule another way, is construed against the grantee in favor of the grantor."

Exclusive franchises are, therefore, contracts between the municipality and the recipient of the franchise and must be construed with reference to the law of contracts.

The legislature of the State of Kansas in conferring upon cities of the second class the right and power to procure from other public utilities, simply conferred on them the power to contract with reference thereto. Sections 65 and 83 of the statutes under which cities of the second class may act, read as follows:

"Section 65. The council may provide for and regulate the lighting of the streets, the erection of of lamp posts and the numbering of buildings in the city, and the construction of sewers; and the council shall have power to make contracts with any person, company or association for such purposes, and give such person, company or association the privilege of furnishing light for the streets, lanes or alleys of said city for any length of time not exceeding twenty-one years."

"Section 83. That cities of the second class in the State of Kansas are hereby granted full power and authority, on behalf of said cities to purchase, procure, provide and contract for the construction of, and construct water works, electric light and gas plants, for the purpose of supplying such cities and the inhabitants thereof with water, light and gas for domestic use, and any and all other purposes."

The City of Hutchinson having only the power to provide by contract for these public utilities, can it be said that by ordinance numbered 402 it contracted with appellant for lighting the streets, lanes and alleys of said city and of furnishing its inhabitants with electric current and gas in the use of the following language?

"That there is hereby given and granted to The Hutchinson Water, Light & Power Company of Hutchinson, Kansas, its successors or assigns, the exclusive right and privilege for a term of twenty years from the date of the passage and approval of this ordinance of supplying the City of Hutchinson, Reno county, Kansas, and the inhabitants thereof * * * with electric current for electric light and power, and for all other purposes for which electric current may be used, except power for the operation of street railways, which exception shall not prevent The Water, Light & Power Company from furnishing electric current to street railways for any and all purposes, and with gas for lighting, heating and for fuel, and for all other purposes for which gas may be used."

Can it be said that this ordinance, which simply grants to appellant the mere right and privilege of erecting and operating an electric light and gas plant, and of furnishing the city and its inhabitants with electric current and gas, without any obligation to do so, and which does not impose upon appellant any duties or any obligations whatsover with reference thereto, is a contract by which the city and its inhabitants are provided with the benefit of these public utilities?

The very purpose and object of the statute in conferring upon municipalities the power to contract

with reference to these public utilities, is that the municipality may by such contract provide itself and its inhabitants with the benefits and comforts to be derived therefrom. And these contracts and franchises are expected to, and should secure to the public these benefits and conveniences, as well as provide the inhabitants of the municipality with these utilities at reasonable rates.

If ordinance numbered 402, so far as the same refers to electric current and gas, is held to be exclusive in character, so that neither the city nor any other person can engage in the furnishing of electric current or gas during the life of the franchise, to-wit, twenty years, then under the very terms of the grant the city and its inhabitants are left in the situation of having no electric light or gas unless appellant chooses to furnish it. It is under no obligation under the grant to do so, and if it should choose to furnish it, then the city and its inhabitants must pay whatever price appellant demands. We do not believe that a court of equity should hold that the language in ordinance numbered 402, so far as it refers to the furnishing of electric light and gas, is sufficient to constitute a contract between the defendant city and the appellant, by which appellant is bound to furnish the defendant city and its inhabitants with electric current and gas for the term of twenty years, and in which the defendant city and its inhabitants are protected and guaranteed in the enjoyment of these utilities. We do not believe that the city ever intended by the use of this language in ordinance

numbered 402 to make an exclusive contract or any contract whatsoever, so far as the same refers to electric light and gas.

III.

But it is claimed these franchises were made exclusive by this ordinance for a consideration moving to the city, in this: That appellant under its water franchise had made reductions in the rental of its hydrants to the city, and had remitted certain indebtedness due from the city to appellant at the time of the enactment of this ordinance. A careful examination of the ordinance will lead to the inevitable conclusion that such was not the case. Assuming, however, that the claim in this respect is correct; *if the City of Hutchinson did not have the power to grant an exclusive franchise or make an exclusive contract, the payment to the city of a consideration, would not confer that power.*

We call attention to the language of the preamble prefixed to ordinance numbered 402 as absolute evidence of the fact that appellant's franchises were not made exclusive by this ordinance for a consideration; the language of said preamble being as follows:

"Whereas, The Hutchinson Water, Light & Power Company is the owner of certain exclusive franchises and contracts with the City of Hutchinson under which and in accordance with which the said company has expended large sums of money in constructing and building water works, electric light works and gas works, etc."

If the appellant was already the owner of exclusive franchises and contracts as declared in this preamble, then ordinance numbered 402 did not and could not confer upon appellant any greater rights in this respect than it already had. Certainly, the defendant city by the use of this preamble did not understand that it was granting an exclusive franchise for the first time to appellant and for a consideration.

However, since there is absolutely no force whatever in appellant's contention that it could and did buy an exclusive franchise from a municipality which was powerless to grant it, we shall not further consume the time of this Honorable Court upon this point.

Our contention is therefore:

First—That under section 2 of the bill of rights of the Kansas constitution, that the legislature could not delegate to cities of the second class the power to make exclusive contracts or grant exclusive franchises.

Second—That cities of the second class in the State of Kansas did not possess the inherent power, and the Kansas legislature had not delegated to them the power to make exclusive contracts or grant exclusive franchises.

Third—That the language used in ordinance numbered 402, upon which appellant relies for its exclusive grant, so far as the same refers to electric current or gas, is insufficient to constitute an ex-

clusive contract or the grant of an exclusive franchise.

Fourth—That is shown by the language used in the preamble and the ordinance referred to, that it was not the intention and purpose of the defendant city to grant to appellant any additional rights or privileges than those which it already had, but rather by said ordinance only to extend the time of the privileges therefore granted, for a term of twenty years, beginning at the date of the passage of said ordinance.

It is, therefore, the respectful contention of appellees that, in the light of the unanimity of authority upon the propositions of law involved in this case, the judgment of the lower court is sound and just, and should be affirmed.

Respectfully submitted,

A. C. MALLOY,
Solicitor for Appellees.

C. M. WILLIAMS and F. F. PRIGG,
Of Counsel.

Since the completion of the foregoing brief the solicitors for appellees have been enabled to examine the brief of appellants in cases Nos. 53 and 54, and the attention of the court is respectfully directed to a few additional authorities contained in the brief of appellees in case No. 54, as the propositions of law involved in the two cases are identical.

IN THE

SUPREME COURT

OF THE

UNITED STATES.

THE WATER, LIGHT & GAS COMPANY, *Appellant.*	File No. 20,289
vs.	
THE CITY OF HUTCHINSON, et al., *Appellees.*	Term No. 54

BRIEF AND ARGUMENT OF APPELLEES.

Inasmuch as a statement of facts in this case would be but a reiteration of the statement of material facts in case numbered 53, file numbered 20,288, it will suffice to say that the statements contained in paragraphs 1 and 2 on page 6 of Appellant's brief are true; and the propositions of law involved in case numbered 54, are identical with those in case numbered 53.

ARGUMENT.

In addition to the argument contained in the brief of Appellees in case numbered 53, to which the Court is most respectfully referred for the argument of Appellees in this case; Appellees are constrained to ask the indulgence of the Court in presenting other authorities and a few comments, by them deemed pertinent and appropriate after examining Appellant's brief, which privilege they have enjoyed since the completion of Appellees' brief in case numbered 53.

It is contended by counsel for Appellant that statutes delegating the power to municipalities to furnish light and contract for same, are to be liberally construed, and that the liberal rule of construction obtains in the State of Kansas, and, in support of this contention, attention is directed to the case of the *State vs. The City of Topeka, 68th, Kansas, 177.* The questions involved in this case were relative to alleged irregularities in the calling of an election to vote bonds, the election itself, and the power of a city of the first-class in the State of Kansas to purchase a system of waterworks incumbered by a mortgage; but in no wise is the broad question of construction of statutes conferring power upon municipalities involved in the case; and the abstracts from the opinion, as quoted in the brief of Appellants, bear upon the pure business discretion which must and does repose in municipal bodies as incident and indispensable to the powers delegated by

statute. Notwithstanding this, however, the Court in its opinion recognizes the rule of statutory construction, contended for by Appellees, by the use of the following language which appears on page 182:

"Cities are the agents of the State in the administration of government and possess such powers as are specifically delegated, and such other powers necessary and incidental thereto which will enable them effectually to perform the duties imposed by the Legislature as departments of government."

Counsel for Appellant also calls attention to the case of *Port Huron vs. McCall, 46th, Mich. 565*, in which, that most able jurist, Justice Cooley rendered the opinion. A careful reading of this opinion will show that the learned Justice adheres to the general doctrine that statutes conferring municipal powers are to be strictly interpreted, and he asserts this to be a just and wise ruling; that municipalities are to take nothing from the general sovereignty except that which is expressly granted. And it is true, he says that in *the exercise of a power conferred*, which concerns only the municipality and can wrong no one, there is no reason for strict interpretation. It will certainly not be contended that the rule of law applicable to the construction of a statute conferring power and the rule of law applicable to the exercise of a power already conferred are the same. A wide distinction is recognized in the above case.

Mr. Henry Campbell Black, in his work on Interpretation of Laws, page 315, says:

"Statutory grants made by Congress or the Legislature of a State are not to be construed by the same rules which are applicable to grants or contracts between private persons. The words of a private grant are to be taken most strictly against the grantor. In the interpretation of a privite contract the Courts are to adopt the construction which the parties mutually put upon it at the time of its making. But in the case of a legislative grant or contract, the fact that the instrument is a law as well as a grant or contract, changes the aspect of the case and renders these rules inapplicable. Thus in a case in Michigan where the principles recognized as applicable to contracts between private parties where urged upon the Court, it was said:

"The fault of this reasoning is that it seeks to apply the principles which relate to common law grants between private persons, but an act of the Legislature differs from a grant of a private person in that it is both a grant and a law, and, as such, interpretation of the law is to be kept in view, and its purposes effectuated whenever the subject matter of a grant comes in controversy; and that construction must be placed on it that will preserve and carry out the object of the Legislature, however such construction may conflict with the principles of the common law or prevent the attaching of equities which would spring from transactions between private parties."

We desire to call attention to Cooley on Constitutional Limitations, sixth edition, page 486, which reads as follows:

"There are unquestionably cases in which the State may grant privileges to specified individuals without violating any constitutional limitations, because from the nature of the case, it is important that they should be possessed and enjoyed by all; if it is important that they should exist, the proper State authority must be left to select the grantees. Of this class are grants of franchise to a corporation.

Such grants, however, which confer upon a few persons what cannot be shared by the many, and which, though supposed to be made on public grounds are, notwithstanding, frequently of great value to the corporations, and therefore sought with avidity, are never to be extended by construction beyond the plain terms in which they are conferred. No rule is better settled than that charters of incorporation are to be construed strictly against the corporators. A just presumption in every such case *is* that *the State has granted in express terms all that it designed to grant at all.* "*When a State*, (says the Supreme Court of Pennsylvania) *means to clothe a corporate body with a provision of her own sovereignty, and to disarm herself to that extent of the power which belongs to her, it is so easy to say so, that we will never believe it to be meant when it is not said.* * * * * * *In the construction of a charter, to be in doubt is to be resolved, and every resolution which springs from doubt is against the corporation. If the usefulness of a company would be increased by extending its privileges, let the Legislature see to it, but let it be remembered that nothing but plain English words will do it.*" *This is sound doctrine and should de vigitantly observed and enfored and this rule is not confined to the grant of a corporate franchise but it extends to all grants of franchises or privileges in the benefits of which the people at large cannot participate.*" (The italics are ours.)

Not wishing to weary the Court by quoting from the numerous authorities upon this practically elemental rule of construction, we beg its indulgence to permit us to quote from one or two more of the leading text writers.

Sections 113, of volume 1, of Abbott on Municipal Corporations, a recent and most excellent authority, says:

"It is seldom that a rule other than that of strict construction is applied, or should be applied to

powers, of whatever nature, exercised or attempted to be exercised by a public corporation. The reason for this salutary principle is that a public corporation is organized not for the pecuniary gain or profit of its members, but as an agency of the government, for the exercise of governmental powers and for the better performance of the duties which every good government owes to those within its jurisdiction. The charter of the corporation contains the grant of its powers; and powers, rights and privileges should not be read into this charter by judicial construction or interpretation. As Chief Justice Shaw, said, (*Spaulding vs. The City of Lowell, 40, Mass. 71.*

"They can exercise no powers but those which are conferred upon them by the act by which they are constituted, or such as are necessary to the exercises of their corporate powers, the performance of their corporate duties, and the accomplishment of the purposes of their association. The principle is fairly derived from the nature of corporations, and the mode in which they are organized and in which their affairs must be conducted. Any ambiguity or doubt, if such exist, must be construed or resolved in favor of the public and as against the exercise, usually through irresponsible agents, of the power by the corporation. The strict rule of construction does not apply as a general rule of law to private corporations, the reason being that they are organized for the personal gain of the members. Property is not acquired through the levy of taxes, but by or through the contribution of personal and private funds over which the State has no direct control. If an injury or a loss results to, or a debt is laid upon a private corporation through exercise of a doubtful or ambigous power, that loss, injury or burden is sustained by private promoters. *If, on the other hand, a public corporation exercises ambiguous or doubtful power, resulting in an oppressive debt, an injury or loss to public property or an increase in taxation, it is the community at large, the property interests, that must sustain and bear the loss and burden. Therefore, to repeat, the rule of strict construc-*

tion applies. And every doubt in the construction of a power granted is against its exercise and in favor of the tax paying public." (The italics are ours).

Relative to the contention of counsel for Appellant that statutes conferring power on municipalities in the State of Kansas are liberally construed by the State Supreme Court; the Court's attention is respectfully directed to the case of *Payne vs. Spratley, 5th Kansas, 545*, wherein occurs the following language from opinion:

"Before proceeding to examine the questions here presented, it seems proper for us to call attention to certain general principles respecting the power of municipal corporations which are regarded as well settled, and which may be stated as follows: Such corporations possess and may exercise those powers which are granted in express terms, also those necessarily implied or necessarily incident to the powers expresslly granted, and lastly those which are sbsolutely indispensable to the declared objects and purposes of the corporation. In this connection it may also be stated that it is regarded as a settled principle of law, that where there is a fair and reasonable doubt as to the existence of a power in such corporations the Courts will not uphold or enforce its execution."

Mr. Justice Peckham, speaking for this Court in the case of *Cleveland Electric R. C. vs. Cleveland*, advance sheets of opinion of U. S. S. Reps. of date Feb. 15, 1907, says:

"The rules of construction which have been adopted by courts in cases of public grants of this nature by the authorities of cities are of long standing. It has been held that such grants should be in plain language, that they should be certain and defi-

nite in their nature, and should contain no ambiguity in their terms. The legislative mind must be distinctly impressed with the unequivocal form of expression contained in the grant, in order that the priviliges may be intelligently granted or purposely withheld. It is a matter of common knowledge that grants of this character are usually prepared by those interested in them, and submitted to the legislatures with a view to obtain from such bodies the most liberal grant of privileges which they are willing to give. This is one among many reasons why they are to be strictly construed."

We find it absolutely impossible to arrive at any other conclusion than that the above quoted rules of construction pertaining to statutes confering powers upon municipalities, constitute not only the weight of authority, but the settled law of the land. But, assuming that the statutes should, as council for Appellant claim, be liberally construed, can it be fairly contended that a statute which confers upon a municipality the right to provide itself with public utilities, and contract with third persons for the same, be construed with sufficient liberality or have sufficient additional authority read into it to enable the municipality to barter or give away the sovereign rights of the State and put in jeopardy the rights, privileges and convenience of the citizens of the community by the making of an exclusive contract for a long term of years, thus excluding any and all benefits which might insure to the public through the avenues of competition?

Our own Supreme Court has passed upon this proposition pointedly in the case of the *Mining Gas*

Co., vs. Gas Mining Company, 55 Kan. 178, in which Justice Allen uses this language:

"The main scope and purpose of the plaintiff's action plainly is to prevent the defendant from laying mains and pipes in the streets of the City of Coffeyville for the purpose of supplying natural gas. In other words, it is to maintain a monopoly of this business. It seeks to test the validity of two city ordinances granting the defendant company the use of the streets, etc., and to restrict the defendant from using the privilege granted. For these purposes the plaintiff clearly has no standing in Court. The city authorities are charged with the duty of preventing encroachment on the streets and public grounds. The proper public officers alone must test the validity of the ordinance under which the defendant claims. The city did not in terms attempt to give the plaintiff company a right to the exclusive use of the streets and alleys for the purpose of laying its pipes. *If it had atttempted to do so it could not for want of power.*" (The italics are ours.)

II.

Nor can resort be had, as is claimed by Appellant, to so-called general welfare statutes for authority to justify a municipality, under the laws of the State of Kansas, in granting an exclusive franchise or privilege. This rule of law is clearly set forth in section 924, volume 3, of Abbott on Municipal Corporations which reads as follows:

"It is necessary, however, to enable a municipal corporation proper to grant an exclusive privilege or license that the authority should be expressly granted. The same rule applies to all subordinate public agencies. The State Legislature, however, possesses the right to exercise all powers not pro-

hibited by the Constitution, and an exclusive privilege may be granted by it even though the power does not affirmatively appear in the constitution which is its written source of authority and so long as it has not been there prohibited.

"NOT INCLUDED WITHIN GENERAL GRANT TO PROVIDE FOR COMFORT AND WELFARE OR REGULAR HIGHWAYS. It is customary in the grant of municipal charters, in addition to specific grants of power, to add what might be termed omnibus clauses which authorize in general terms the public authorities to take such action as they deem necessary to provide for the general comfort, welfare and safety of the community; to regulate the use of public highways; to arrange for either a supply of water or light, and in so doing consent to the construction of the facilities which are necessary to accomplish these purposes. *It has been repeatedly held that through the grant of any or all of these powers, a public corporation has no legal authority to give an exclusive license, privilege or contract to private persons, natural or artificial, for the use of the public highways and erection of a plant for the manufacture or distribution or both of these modern necessities. This rule has been well established by the great weight of authority.* The principle is also applied to the grant of privileges or licenses *not exclusive* in their character but which serve to furnish a supply of these same commodities or other service. In previous sections it has been stated that the modern tendency of the State is to give subordinate public corporations a large degree of control over public property within their jurisdiction and to require the consent of the public authorities before private persons engage in the business of supplying water, light, power or telephone, telegraph or transportation service, can legally occupy public highways or lawfully carry on on their business. *Even the existence of this principle does not prevent the application of the rule above given.*" (The italics are ours.)

In section 925 of the same volume appears the following:

"It has already been stated that the presumption of law is against the existence of an exclusive grant or privilege and one must, therefore be expressly granted before exclusive privileges be claimed under it. Judge Brewer while on the Circuit Court, in a Kansas case, said: 'And if a direct grant from the Legislature carries no implication of exclusiveness, why should it be presumed that the Legislature intended to vest in a city the power to give exclusive privileges, when it has in terms granted no such power? *Will the power to create monopolies be presumed unless it is expressly withheld? That would reverse settled rule of construction, which is that nothing in the way of exclusiveness or monopoly passes, unless expressly named. It will not aid to say that the grant of general supervision and control of the streets carries with it, by implication, power to give exclusive privileges;* for that grant implies a vesting in the city of continuous control. It is no authority for surrendering its constant supervision and management to any other corporation or individual. *It implies that the city today, tomorrow and so long as the grant remains, shall exercise its constant judgment as to the needs of the public in the streets, and not that it may today surrender to an individual or to a private corporation the right of determining a score of years hence what the public may then need.* The city may today determine that one street railroad will answer all the wants of the public, and so give the privilege of occupying the streets to but a single company. Ten years hence its judgment may be that two railroads are needed. Where is the language in the charter which restricts it from carrying such judgment into effect by giving like privilege to a second company? It is doubtless true, as counsel say, that capital is timid, and will not undertake such enterprises without abundant guaranties and undoubted security. But this suggests matters of policy, and presents considerations for

the Legislature. It does not aid in determining what powers have been granted, or in the construction of charters or ordinances. *When the Legislature deems that the public interests require that cities should be invested with power to grant exclusive privileges it will say so in unmistakable terms, as it already has in some instances. Till then Courts must deny the possession of such power.* * * * '"

We call attention to Mr. Dillon on Municipal Corporations, 4th Edition, pages 392 to 393 in which he says;

"Muncipal charters or incorporating acts are sometimes silent as to the power to pass by-laws or ordinances and where this is the case the municipal body has the power incidental to all corporations to enact appropriate by-laws. Occasionally the charter or incorporating act without any special enumeration of the purposes for which by-laws may be made, contain a general grant and comprehensive of power to pass all such as may seem necessary to the well being and good order of the place. More frequently, however, the charter or incorporating act authorizes the enactment of by-laws in certain specified cases and for certain purposes; after this specific enumeration and general provision is added that the corporation may make any other by-laws or regulations necessary to its welfare, good order, etc., not inconsistant with the constitution or laws of the state. This difference is essential to be observed for the power which the corporation would possess under what may, for convenience, be termed 'the general welfare clause,' if it stood alone, may be limited, qualified, or; when such intent is manifest, impliedly taken away by provisions specifying the particular purposes, for which by-laws may be made.

"It is clear that the general clause can confer no authority to abrogate the limitations contained in special provisions. When there are both specified and general provisions the power to pass by-laws under the special or express grant can only be ex-

ercised in the cases and to the extent as respects those matters allowed by the charter or incorporating act; and the power to pass by-laws under the general clause does not enlarge or annul the power conferred by the special provisions in relation to their various subject matters."

III.

It is contended by counsel that the furnishing of light to a city and its inhabitants is an exercise of the police power, and in support of this contention principal reference is made to the case of *The New Orleans Gas Light Co., vs. Louisiana Light and Heat Co., 115 U. S. 674.*

We do not conceive that this Honorable Court, in the case cited by counsel, sustain their contention. It was contended by the appellee in that case that the supplying of New Orleans and its inhabitants with gas had relation to the public comfort, and in some sense to the public health and the public safety, and for that reason it was a subject to which the police power extended, and that it was not competent for one legislature to limit or restrict the the power of a subsequent legislature in respect to these subjects. It was consequently argued that a state might at pleasure recall the grant of an exclusive privilege, and that no agreement by or upon whatever consideration with reference to a matter connected in any degree with the public comfort, the public health or the public safety would constitute a contract or obligation which was protected against impairment by the national constitution.

Similar reasons were urged in the Walla Walla case, 172 U. S., page 1, by the City of Walla Walla.

We concede the law to be as announced in the case of *The C. B. & Q. Railroad Co., vs. Illinois, 200 U. S., page 561*, that the police power of a state embraces regulations designed to promote the public convenience or the general prosperity, as well as regulations designed to promote the public health, public morals and the public safety.

If the position of counsel be correct that the furnishing of light to a city and its inhabitants, or the making of a contract with others to furnish light to a city is the exercise of the police power by the city, it could very plausibly be urged as a reason why the claim of appellant in this case should not be sustained upon the principle that the police power remains constantly under the control of the legislative authority, and that the city council could not bind itself nor its successors to contracts, which would be against the peace, good order, health, morals, the public convenience or the general prosperity of the municipality, and also upon the further principle that neither the state nor the municipality could delegate their police power to individuals or private corporations, nor sufficiently divest themselves of such power so as to tie their hands and prevent such future enactments or actions as might be by them determined to be reasonably necessary, so long as the future enactment was not an abuse of the power. For by what rule of law could it be claimed that the city had no right to subsequently legislate in such

manner as to impair the grant to appellant if such city determined that such action was necessary for the well being of its citizens. Counsel certainly would not contend that there was an absolute and irrevocable delegation by the city to the company of these police powers, so far as they may relate to the said grant, for the term of twenty years; and could it not also be argued that, if, in the making of this grant the city was but exercising her police power, subsequent impairment of the same by the granting of a competing privilege could give rise to no question of the impairment of contract, since the police power is reserved to, and remains in the municipality at all times to be by it exercised for the welfare of its citizens. We understand, however, the case of the *The New Orleans Gas Light Co., vs. The Louisiana Light & Heat Co., supra*, to decide that the contract involve was not in any legal sense to the prejudice of the public health or the public safety of the people of New Orleans, or that the contract in any way interfered with the exercise by the city of New Orleans of its police power. The court in passing upon this question used this language:

"It is none the less a contract because the manufacture and distribution of gas, when not subjected to proper supervision, may possibly work injury to the public; for the grant of exclusive privileges to the plaintiff does not restrict the power of the state, or of the municipal government of New Orleans acting under authority for that purpose, to establish and enforce regulations which are not inconsistent with the essential rights granted by plaintiff's charter, which may be necessary for the protection of

the public against injury, whether arising from the want of due care in the conduct of its business, or from an improper use of the streets in laying gas pipes, or from the failure of the grantee to furnish gas of the required quality and amount. The constitutional prohibition upon state laws impairing the obligation of contracts does not restrict the power of the state to protect the public health, the public morals, or the public safety, as the one or the other may be involved in the execution of such contracts. Rights and privileges arising from contracts with a State are subject to regulations for the protection of the public health, the public morals and the public safety, in the same sense, and to the same extent, as are all contracts and all property, whether owned by natural persons or corporations.

Whatever therefore in the manufacture or distribution of gas in the City of New Orleans proves to be injurious to the public health, the public comfort, or the public safety, may, notwithstanding the exclusive grant to the plaintiff, be prohibited by legislation, or by municipal ordinance passed under legislative authority. It cannot be said with propriety that to sustain that grant is to obstruct the state in the exercise of her power to provide for the public protection, health and safety."

In the Walla Walla case Mr. Justice Brown speaking for the court with reference to the contention in that case said:

"The argument that the contract is void as an attempt to barter away the legislative power of the city council rests upon the assumption that contracts for supplying a city with water are within the police power of the city, and may be controlled, managed, or abrogated at the pleasure of the council. This court has doubtless held that the police power is one which remains constantly under the control of the legislative authority, and that a city council can neither bind itself nor its successors to contracts prejudicial to the peace, good order, health, or mor-

als of its inhabitants; but it is to cases of this class that these rulings have been confined.

If a contract be objectionable in itself upon these grounds, or if it becomes so in its execution, the municipality may, in the exercise of its police power, regulate the manner in which it may be carried out, or may abrogate it entirely, upon the principal that it cannot bind itself to any course of action which shall prove deleterious to the health or morals of its inhabitants. In such case an appeal to the contract clause of the Constitution is ineffectual."

In the light of the above authorities it is our contention that the making of this contract with appellant by the defendant city was not the exercise of its police power, but was the exercise of a power to contract, which must depend upon authority expressly given by the legislature of the state.

And we claim that an examination of all of the reputable authorities wherein the police power of a state or municipality has been invoked to aid in establishing a grant, or enlarge the powers conferred upon a municipality in relation to public utilities, will deduce the rule of law, that where the municipality is the creature of the statute, and the statute has conferred upon the municipality certain powers with reference to public utilities, that the particular sections conferring these powers are construed to be both a grant and a limitation of the authority of the municipality, viz: the legislature in conferring particular powers in reference to particular subjects granted in terms all that it intended to grant and therefore excluded all that it did not grant; and general laws relating to the conferring of police power

upon municipalities cannot be invoked to enlarge upon the powers especially granted.

IV.

The claim of appellant of special equities in its favor can not be considered in the determination of the legal question here involved.

These considerations might be urged against a claim that the grant was absolutely void.

In the case of *The Water Works Company vs. The City of Columbus, 48 Kans., page 100*, cited and quoted from so copiously by counsel for appellant, the City of Columbus made and entered into a contract with the water company for water for fire protection for the term of twenty-one years; and after the water company had erected its plant at a great expense and had been furnishing the city with water for about four years, which service had been accepted by the city, and the consideration for same paid for about three years, the city undertook to repudiate its contract upon the alleged ground that the contract was void, in that the city did not possess the power to make such a contract for the term of twenty-one years. The decision of the court was in substance that while the City of Columbus did not possess the power to make the contract in question covering a period of twenty-one years, that it did possess the power to make a contract for a shorter and reasonable term, and therefore denied the right of the city to repudiate the

contract in toto. The question of exclusiveness was not involved in this case nor did the court hold even inferentially that any considerations of equity could be resorted to, to sustain or uphold an attempted exclusive grant.

Appellees do not wish to be understood as claiming that the grant involved in this case was absolutely void, but instead they admit that the grant to appellant's assignor, in every particular except the alleged exclusiveness, is valid and binding upon the city, and that the appellant cannot be denied the right and privilege of furnishing to the city and its inhabitants, for the full life of its franchise, such lighting service as may be contracted for. The contention of appellees is that in so far as the grant of privilege to the appellant's assignor attempted to confer exclusive rights, that such act was *ultra vires* and absolutely void. The rule that, as to contracts that may be partly valid, and partly void for want of power, when partly performed and accepted, equitable considerations will obtain to uphold the part that may be valid, was very aptly applied by Judge Sanborn of the Eighth Circuit in the case of *Illinois Trust & Savings Bank vs. The City of Arkansas City, 22 C. C. A., page 179*: A Kansas case, in which he says:

"It was upon the principles we have conceded, and upon the authorities just cited, that the court below seems to have based its conclusion that the exclusiveness of this grant would avoid the entire contract. But these principles and decisions are far from sustaining the proposition that, after this con-

tract has been substantially performed by the gas company, after the waterworks have been constructed according to its terms, and after the city has accepted and used them for years, and has thus secured the substantial benefits of its grant, it can repudiate all the obligations it had the power to assume, because it assumed one that was beyond its power. The conclusion of Judge Brewer in *Jackson County Horse R. Co. vs. Intertate Rapid Transit Ry. Co., supra*,—a suit to enjoin the railway company from constructing a second street railway in a city,—at page 310, "that so much of the ordinance as purported to give exclusive privileges to the lessor or complainant was beyond the powers vested in the city of Kansas, and therefore void," points to the true solution of the question under consideration. If the gas company stood at the initiation of the execution of this contract defending against its specific performance, on the ground that the city had no power to make its right to use these streets exclusive, that defense might deserve some consideration. But now the gas company has constructed the works. It has executed the contract on its part as far as it has been possible for it to be executed. The exclusiveness of its right to the use of the streets of the city was granted for its sole benefit. If it does not receive this benefit, the city suffers no loss. The only effect upon the city is that it gets the waterworks for a less price than it agreed to pay for them. No reason occurs to us why, under this state of facts, the gas company or its successors may not waive the receipt of the exclusive right, and recover the remainder of the consideration which the city promised to pay it. The grant of this exclusive right was neither immoral nor illegal. It was merely *ultra vires*. We know of no rule of law nor of morals which relieves the recipient of the substantial benefits of a partially executed contract from the obligation to perform or pay that part of the consideration which he can perform or pay, because the performance of an insignificant portion of it is beyond his powers. On the other hand, the true rule is, and

ought to be, the converse of that proposition. It is that when a part of a divisible contract is *ultra vires*, but neither *malum in se*, nor *malum prohibitum*, the remainder may be enforced, unless it appears from a consideration of the whole contract that it would not have been made independently of the part which is void."

We submit that in all instances wherein reputatable authorities have given ear to equitable considerations in support of municipal grants, it has only been in support of powers possessed by the municipality. And where such municipality exceeded its authority in the making of the contract, and the contract was sufficiently divisible to give effect to one portion and nullify another, equitable considerations have never influenced the courts toward sustaining that portion that was *ultra vires*. In view of equitable maxims appellees fail to see how appellant can invoke the aid of the consideration claimed, based upon the statement of facts alleged in its bill and commented upon in the brief of counsel at page 58 and page 59 thereof. The statement is to the effect that in consideration of the granting to it of an exclusive franchise it made certain abatements of indebtedness, accrued and to accrue, aggregating $60,000, to the appellee city. And that by reason of the default made by the city in the payment of its bills prior to said grant, the appellant's assignor was thereby compelled to default in the payment of its indebtedness to its mortgage creditors, and that simultaneously with the abatement of $60,000 to the city, there was an adjustment made between the

appellant's assignor and its mortgage creditors whereby appellant's assignor received an abatement upon its indebtedness of $187,500.00, and that this abatement was in consequence of the abatement which appellant's assignor was required to, and did make to said city. From the above statement the appellees might be disposed to admit that were the mortgage creditors of the appellant or its assignor, parties to this controversy some resort might by them be had to these equitable considerations (not to the extent, however, of seeking to uphold an act clearly *ultra vires)*, but we find it impossible to see how the appellant can have any resort to equity, when, by its own statement of facts, a net profit of $127,500.00 resulted to it from the simultaneous abatements. * *

As heretofore contended by appellees in their brief in case numbered 53, if the municipality did not possess the power and authority to make a grant exclusive in terms or character no payments of any amounts, or no considerations of equity could confer that power or be invoked to extend the power conferred beyond the express delegation of the statute.

Counsel for appellees desire to acknowledge the ingenuity displayed in the brief of counsel for appellant, yet we are unable to discover a single authority that pointedly sustains appellants main contention in this case; nor do we find it possible to conceive that there are special equitable considerations moving to appellant; nor how any resort could be had thereto if such existed.

It is respectfully urged by appellees that the utter lack of power within the municipality to grant an *exclusive* privilege is the controlling principle in this controversy, and stands unshaken by the intertwined abstractions and assumed premises of appellants argument.

The decision of the lower court, sustaining the demurrer, should therefore be affirmed.

Respectfully submitted,

A. C. MALLOY,
Solicitor for Appellees.

C. M. WILLIAMS and F. F. PRIGG,
Of Counsel.

Office Supreme Court, U. S.
FILED.
NOV 13 1907
JAMES H. McKENNEY,
Clerk.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1907.

No. 53-54.

THE WATER, LIGHT AND GAS CO. OF HUTCHINSON, KANSAS, APPELLANT,

v.

THE CITY OF HUTCHINSON, KANSAS, ET AL.

STATUTES NOT PRINTED IN THE BRIEFS.

The following statutes, together with the statutes cited in the respective briefs, constitute all the law of Kansas applicable to the subject of street lighting under discussion.

SECTION 30. The cities coming under the provisions of this act, in their corporate capacities, are authorized and empowered to enact ordinances for the following purposes, in addition to the other powers granted by this act.

10. To provide for and regulate the lighting of the streets and the erection of lamp posts.

18. To make contracts with, and authorize any person, company or association to erect gas works in said city and give such persons, company or association the exclusive privi-

lege of furnishing gas to light the streets, lanes and alleys of said city for any length of time not exceeding twenty-one years.

General Statutes Kansas, 1868, chapter 19, section 30, subdivisions 10 and 18.

SECTION 59. The council may provide for and regulate the lighting of the streets, and the erection of lamp posts, and the council shall have power to make contracts with and authorize any person, company or association to erect gas works in said city, and give such person, company or association the exclusive privilege of furnishing gas to light the streets, lanes and alleys of said city for any length of time not exceeding twenty-one years.

Session Laws Kansas, 1872, chapter 100, section 59.

WATER, LIGHT AND GAS COMPANY OF HUTCHINSON *v.* THE CITY OF HUTCHINSON, KANSAS.

SAME *v.* SAME.

APPEALS FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KANSAS.

Nos. 53, 54. Argued October 24, 1907.—Decided December 23, 1907.

A grant conferring a privilege is not necessarily a grant making that privilege exclusive.

Grants by the State to municipal corporations, like grants to private corporations, are to be strictly construed, and the power to grant an exclusive privilege must be expressly given, or, if inferred from other powers, must be indispensable, and not merely convenient, to them. *Citizens' Street Railway* v. *Detroit*, 171 U. S. 48.

The Kansas statutes for the government of cities, as construed by the highest court of that State, do not confer on cities of the second class the power to grant exclusive franchises and, in the absence of such power expressly conferred, the exclusive features of an ordinance of such a city granting an exclusive franchise are invalid. *Vicksburg* v. *Waterworks Co.*, 206 U. S. 496, distinguished.

144 Fed. Rep. 256, affirmed.

THE ultimate question in these cases is the validity of Ordinance No. 402 of the city of Hutchinson, which took effect March 17, 1897, and by which the Water, Light and Gas Company claims to have, for the period of twenty years from such date, the exclusive right and privilege of supplying the city and its inhabitants with water, and with light, heat and power by means of electricity and gas.

On the nineteenth of December, 1905, the city enacted and published Ordinance No. 651, granting permits to Emerson Carey and others, their successors and assigns, to construct and operate a street railway in and along the streets of the city, and to construct and operate electric and gas plants for the purposes for which electricity may be used.

These suits were brought to command the city and those claiming under Ordinance No. 651, to "desist from doing any

acts or exercising any pretenses of right to act" under the ordinance which will in anywise affect the exclusive right of the Water, Light and Gas Company "to furnish the city and its inhabitants with electric or gas light for lighting and heating purposes or power, except for street cars and electric railways, and also from making or proceeding to make any contract for furnishing light or gas to said city and its inhabitants" until the expiration of the "franchises and contracts" of that company.

The cases went off on demurrers to the bills. The Circuit Court, assuming that Ordinance No. 402 was exclusive in its terms and was intended to be so by the city, held that the city did not possess the power, either inherent or under the law of its creation, to make a contract binding and exclusive of all others, and entered decrees dismissing the bills. 144 Fed. Rep. 256.

The facts are: In 1885 the city granted to the Holly Manufacturing Company, its successors and assigns, an exclusive right to build and operate waterworks for twenty years. The company erected and operated the works until the subsequent assignment of its rights.

In the same year the city granted to the Interstate Gas Company the right to erect and maintain gas works for the period of twenty-one years; and in 1886 granted to Drake and Orton the right for the period of twenty years to construct and operate an electric light plant. The latter right, and those granted to the two companies, passed by successive assignments, with the knowledge and consent of the city, to the Water, Light and Power Company, and existed in that company at the time of the passage of Ordinance No. 402.

The various companies expended in the aggregate on the construction of their plants and equipment $400,000, to secure which the Hutchinson Water, Light and Power Company executed a mortgage upon all the water, light and gas rights and franchises and properties.

Subsequently, the city became financially embarrassed, so

that before the year 1897 it had become indebted for hydrant rentals in the sum of $12,800 in excess of its ability to pay.

On account of this default of the city the company became embarrassed and hindered in the payment of interest on its mortgage, and its mortgage bondholders took possession of its property, and operated the plant during the year 1896 and until the readjustment of its affairs in the spring of 1897, resulting in the passage of Ordinance No. 402.

By reason of its embarrassment the company found it expedient to scale down its bonded indebtedness and secure a new franchise from the city, and in consideration of securing the same, and the readjustment of the contract obligations between the company and the city, the bondholders agreed to reduce and scale down their mortgage indebtedness from $400,000 to $212,500.

On March 5, 1897, at the earnest and repeated solicitation of the city, and in consideration of its inability to discharge its past indebtedness to the company and to pay the current indebtedness thereafter, the company agreed with the city to remit one-half of the indebtedness then due; that is, to scale it down to $6,400, and to reduce the sum thereafter annually payable for hydrant rental from $12,800 to $6,000 for the years of the contract, and to reduce the rental for hydrants thereafter located from $60 to $36, and reduce the number of hydrants from twelve to ten per mile. These concessions and abatements were made on the condition of a renewal and extension of the franchise and contract rights of the company. And the city was to have, what it did not have before, the right to purchase or otherwise acquire the light and gas properties at any time after ten years from the date of the renewal and adjustment. In view of these considerations and in pursuance of them the city passed Ordinance No. 402, to take effect March 17, 1897, and by that ordinance "granted to the company, its successors and assigns, for the period of twenty years from said date the exclusive privilege of supplying the city and its inhabitants with the public utilities of

water, light, heat and power by means of electric current and gas." But it was agreed that the right for furnishing electric current or power should not be exclusive as to or for the operation of street railways, nor exclusive as to any person residing in the city, or any company doing business therein manufacturing gas or electricity for his or its own use for light or fuel. A copy of the ordinance was attached to and made part of the bill. The concessions and abatements would not have been made by the company except for the consideration of the exclusive rights and privileges granted; and the total of the reductions of monetary demands made for what was due and to become due for the period the water franchise had to run amounted to $65,240, which the company remitted from its contract rights and demands against the city. The mortgage bondholders of the Water, Light and Power Company, for the purpose of effectuating the promises and agreements between the company and the city contained in Ordinance No. 402, scaled down their indebtedness from $400,000 to $212,500 and cancelled their mortgage and accepted a substitute mortgage on the property, franchise and contracts and on its income of $212,500.

The Water, Light and Power Company, on the fourth of October, 1902, sold and transferred to the Water, Light and Gas Company, the complainant, all of its property rights and franchise, and complainant has since that date been in possession of the same, and in the fulfillment of the duties and obligations imposed on it by its purchase and said ordinance liabilities with the consent of the city, and the city has ratified and approved the same and contracted and dealt with the complainant as the successor of the Water, Light and Power Company. The Water, Light and Gas Company has since its purchase expended large sums of money in the improvement and enlargement of its properties and the service rendered by it, and has, under the direction and order of the city, extended its water mains and placed hydrants upon such extensions, and, as agreed by it, has reduced the number of hydrants on

its extended mains from twelve to ten per mile, and generally has complied with the orders and requests of the city, whether or not under the Ordinance No. 402 it was required to comply with such orders, all of which was done in reliance on the obligations of the city and its good faith in carrying out all the terms and conditions and provisions of Ordinance No. 402, but the city, notwithstanding, through its mayor and councilmen, on or about the nineteenth of December, 1905, enacted and published Ordinance No. 651, by which it assumed to grant to Emerson Carey and others the right and privilege for the term of twenty years thereafter of establishing and operating in the city a plant and appliances for the manufacture and sale to the city and its inhabitants of electric light and power and manufactured and natural gas, with the right and privilege to lay and construct gas mains and pipes and erect poles, and wires and all other things necessary to the maintenance of said public service in the streets, alleys and public places of the city in opposition to the business of complainant.

It is alleged that Ordinance No. 402 constitutes a contract between the city and the complainant in respect to all the rights secured, and in particular in respect to the exclusive rights and privileges thereby conferred, and that the city, by and through Ordinance No. 651, illegally and inequitably impairs the same, in violation of the provisions of the Constitution of the United States, which forbids the impairment of the obligation of contracts by the several States of the Union.

Neither the city nor any of the grantees in Ordinance No. 651 have paid or tendered complainant the monetary abatement, or the reductions and concessions paid or secured to the city in consideration of the enactment of Ordinance No. 402, or to secure complainant from loss from the competition of the rival public service association or company. At the time the public service enterprises were undertaken by the grantors of complainant the city of Hutchinson had about 5,000 inhabitants, and at the time complainant succeeded to their rights about 10,000, and at both of said times it would have been

impossible, and is now impossible, to maintain rival or competing companies in the city so as to enable either to earn a fair and reasonable income on the cost of their respective properties, and at none of the times when the complainant or its grantors undertook the work of furnishing said public necessities would it or they have done so without being secured in the enforcement thereof for a reasonable time against the competition of rival companies, nor could the large sums of money have been obtained therefor except under like security. The company has not up to this time, and will not for many years to come, have secured the repayment of the purchase price of said public service and the cost of the betterments, extensions and improvements.

The company alleges that it does not seek to prevent the granting by the city of a franchise or contract for the erection and maintenance of an electric railway in the city or elsewhere.

An injunction was prayed against the doing or exercising any pretenses of right under Ordinance No. 651 which would in any way affect the exclusive rights of the company to furnish electricity and gas for lighting and heating purposes.

Mr. John F. Dillon and *Mr. Frank Doster*, with whom *Mr. Harry Hubbard*, *Mr. Houston Whiteside* and *Mr. Howard S. Lewis* were on the brief, for appellant:

Statutes delegating to municipalities the police power to furnish light or to procure it to be furnished are to be liberally construed to effectuate their object, and are liberally construed in Kansas. *Port Huron* v. *McCall*, 46 Michigan, 565; *State* v. *City of Topeka*, 68 Kansas, 177, 182; *Andrews* v. *National Foundry & Pipe Works*, 61 Fed. Rep. 782.

Under the statutes of Kansas authorizing cities of the second class "to provide for and regulate the lighting of the streets, and to make contracts with any person, company or association for such purpose, and to give such person, company or association the privilege of furnishing light for the streets of said city for any length of time not exceeding twenty-

one years," power was given to make an exclusive contract, such as Ordinance No. 402, for a limited and reasonable period to light the streets. General Statutes of Kansas, 1889, §§ 759, 787, 816, 817, 824, 1401 and 1402; *Manley* v. *Emlen*, 46 Kansas, 655; *Wood* v. *Waterworks Co.*, 33 Kansas, 590, 597; *Waterworks Co.* v. *City of Burlington*, 43 Kansas, 725, 728; *The Columbus Waterworks Co.* v. *The City of Columbus*, 46 Kansas, 666; *The Columbus Waterworks Co.* v. *The City of Columbus*, 48 Kansas, 99; *Vicksburg* v. *Vicksburg Waterworks Co.*, 202 U. S. 453; *City of Walla Walla* v. *Walla Walla Water Co.*, 172 U. S. 1; *State* v. *City of Topeka*, 68 Kansas, 177; *City of Cleveland* v. *Cleveland City Ry. Co.*, 194 U. S. 517; *Omaha Waterworks Co.* v. *City of Omaha*, 147 Fed. Rep. 1; *California Reduction Co.* v. *Sanitary Reduction Works*, 199 U. S. 306.

Under the general power "to make all contracts and to do all other acts in relation to the property and affairs of the city necessary to the exercise of its corporate or administrative powers," and under the general welfare clauses and cognate provisions of the statutes of Kansas governing cities of the second class, such cities have power to make an exclusive contract for twenty years, such as Ordinance No. 402, subject to police control, to furnish the city and its inhabitants with light. *Eureka Light & Ice Co.* v. *City of Eureka*, 5 Kans. App. 669, 676; *S. C.*, 48 Pac. Rep. 935; *Cherryvale Water Co.* v. *City of Cherryvale*, 65 Kansas, 219, 228; *Crawfordsville* v. *Braden*, 130 Indiana, 149; *Manley* v. *Emlen*, 46 Kansas, 655; *Wood* v. *Waterworks Co.*, 33 Kansas, 590, 597; *Waterworks Co.* v. *City of Burlington*, 43 Kansas, 725, 728; *The Columbus Waterworks Co.* v. *The City of Columbus*, 46 Kansas, 666; *S. C.*, 48 Kansas, 99; *Ellinwood* v. *Reedsbury*, 91 Wisconsin, 131; *Greenville* v. *Greenville Waterworks Co.*, 125 Alabama, 625; *Grace* v. *Hawkinsville*, 101 Georgia, 553; *Webb City Waterworks Co.* v. *Webb City*, 78 Mo. App. 422; *Aurora Water Co.* v. *Aurora*, 129 Missouri, 540; *Rome* v. *Cabot*, 28 Georgia, 50; *Heilbron* v. *Cuthbert*, 96 Georgia, 312. See also *City of Newport* v. *Newport Light Co.*, 84 Kentucky, 166.

Mr. Max Pam, *Mr. C. M. Williams* and *Mr. A. C. Malloy*, with whom *Mr. F. F. Prigg* was on the brief, for appellees:

The city of Hutchinson in the State of Kansas, being a city of the second class in said State, had no power to grant an exclusive privilege or franchise to the complainant. *Citizens' Street Ry.* v. *Detroit Railway*, 171 U. S. 48, and cases cited; *Jackson County Horse R. Co.* v. *Interstate Rapid Transit Ry. Co.*, 24 Fed. Rep. 307; *Illinois Trust & Savings Bank* v. *City of Arkansas City*, 22 C. C. A. 179; *Saginaw Gas Light Co.* v. *City of Saginaw*, 28 Fed. Rep. 529; *Vicksburg* v. *Vicksburg Water Co.*, 202 U. S. 453, discussed and distinguished.

Even admitting that under the constitution of Kansas the legislature of the State had power to grant exclusive franchises, yet it did not have the right to delegate such power. See Constitution of Kansas, § 2 of the Bill of Rights; *In re Lowe*, 54 Kansas, 57.

MR. JUSTICE MCKENNA, after making the foregoing statement, delivered the opinion of the court.

The Circuit Court assumed that Ordinance No. 402 was in terms exclusive and was intended to be made so by the city. We shall assume the same thing. Indeed, it would be impossible to decide otherwise. It recites that the Hutchinson Water, Light and Power Company "is the owner of certain exclusive franchises and contracts with the city of Hutchinson," under which it has expended large sums of money, and that the city "is desirous of modifying and changing said franchise and contracts to the advantage of said city of Hutchinson, without cancelling or *abridging* any of the *rights* or *privileges* vested in said company," and that, therefore, in consideration of the surrender of all existing contracts and franchises, except as therein specified, "there is hereby given and granted" to the company, "its successors or assigns, the *exclusive rights and privileges* for the term of twenty years from the date of the passage and approval of this ordinance, of

supplying the city of Hutchinson, Reno County, Kansas, and the inhabitants thereof, by a system of waterworks with water . . . with electric current for electric light and power, and for all other purposes for which electric current may be used, except power for the operation of street railways. . . ." The city, it is clear, in express terms and for consideration received granted exclusive rights. The power of the city to do this is denied, and this makes the question in the case. The Circuit Court ruled against the existence of the power applying to the statutes conferring power upon the municipalities of the State the rule of strict construction. The ruling is challenged by appellants, and it is contended, that the general welfare clause and "the municipal power to furnish light carries with it the obligation to enter into all contracts and to exercise all subsidiary powers which the circumstances of the case require." And it is further contended that in Kansas statutes delegating to cities the power to furnish light and water have been liberally construed by the Supreme Court of the State.

That grants to municipal corporations, like grants to private corporations, are subject to the rule of strict construction was announced by this court in *Citizens' Street Railway* v. *Detroit Railway*, 171 U. S. 48, following and applying the doctrine of previous cases. It was said that the power to grant an exclusive privilege must be expressly given, or, if inferred from other powers, must be indispensable to them, and that this principle was firmly fixed by authority. See also Dillon on Municipal Corporations, § 80, fourth edition. The case was concerned with a grant to a street railway, and in the argument of the cases at bar a distinction is asserted between an exclusive privilege to occupy the surface of streets and interfere with "a matter of common right," and a privilege to use the streets below the surface "as incidental only and subsidiary to the performance of a contract pertaining to another matter," and on this distinction, it is argued, the "first must show an express grant of authority" to make the right exclusive,

but that the second is not limited by such requirement. The distinction is only one of degree and has not been considered as varying the application of the rule of construction announced. In *Freeport Water Co.* v. *Freeport City*, 180 U. S. 587, a statute of Illinois was considered which gave power to cities and villages to provide for the supply of water at such rates as might be fixed by ordinance and for a period not exceeding thirty years. And passing upon these provisions as constituting a contract precluding a change of rates from time to time, we said (page 598): "The rule which governs interpretation in such cases has often been declared. We expressed it, following many prior decisions, in *Citizens' Street Railway* v. *Detroit Railway*, 171 U. S. 48, to be that the power of a municipal corporation to grant exclusive privileges must be conferred by explicit terms. If inferred from other powers, it is not enough that the power is convenient to other powers; it must be indispensable to them." See also *Rogers Park Water Company* v. *Fergus*, 180 U. S. 624; *Joplin* v. *Light Co.*, 191 U. S. 150, and cases cited; *Owensboro* v. *Owensboro Waterworks Co.*, 191 U. S. 358. The doctrine was recognized as existing in *Walla Walla* v. *Walla Walla Water Co.*, 172 U. S. 1, and in *Vicksburg* v. *Waterworks Co.*, 202 U. S. 453. In the two latter cases the power of the respective cities to make a contract, precluding them from building waterworks and operating their own water systems, was declared. In the *Vicksburg case* it was pointed out that the power of the city to exclude itself from building waterworks of its own was recognized to exist by the Supreme Court of Mississippi.

In *Vicksburg* v. *Vicksburg Waterworks Co.*, 206 U. S. 496, a contract of the city, fixing a maximum rate, was sustained upon the authority of the decisions of the Supreme Court of the State, holding that under a broad grant of power conferring without restriction or limitation upon the city, the right to make a contract for a supply of the water, it was within the right of the city council, in the exercise of that power, to make a binding contract fixing the maximum rate at which the water

should be supplied to the inhabitants of the city for a limited term of years.

This case is especially relied on by appellant as establishing a right in the city of Hutchinson to grant an exclusive franchise under the statutes of the State, both from their letter and as construed by the Supreme Court of the State. A consideration of the statutes and decisions, therefore, becomes necessary. Those quoted by the Circuit Court in its opinion are inserted in the margin.[1] They confer power to provide for the general welfare and enable a city to construct water and lighting plants of its own or "to make contracts with any person or company for such purposes," and give such person or company "the privilege of furnishing light for the streets, lanes or alleys of said city for any length of time not exceeding twenty-one years."

In addition to these sections, appellant cites others, which give to the city the power to make all contracts in relation to its property and affairs necessary to the exercise of its corporate

---

[1] SEC. 35. The mayor and council of each city governed by this act shall have the care, management and control of the city and its finances, and shall have power to enact, ordain, alter or repeal any and all ordinances not repugnant to the constitution and laws of this State, and such as it shall deem expedient for the good government of the city, the preservation of the peace and good order, the suppression of vice and immorality, the benefit of trade and commerce, and the health of the inhabitants thereof, and such other ordinances, rules and regulations as may be necessary to carry such power into effect. General Laws of 1901, § 971, p. 225.

SEC. 65. The council may provide for and regulate the lighting of the streets and the erection of lamp posts, and the numbering of the buildings in the city, and the construction of sewers; and the council shall have power to make contracts with any person, company or association for such purposes, and give such person, company or association the privilege of furnishing light for the streets, lanes or alleys of said city for any length of time not exceeding twenty-one years. General Laws of 1901, § 1000, p. 232.

SEC. 83. That cities of the second class of the State of Kansas are hereby granted full power and authority, on behalf of said cities, to purchase, procure, provide and contract for the construction of and construct waterworks, electric light and gas plants for the purpose of supplying such cities and the inhabitants thereof with water, light and gas for domestic use and any and all other purposes. General Laws of 1901, § 1017, p. 237.

or administrative powers, the power to open and improve streets, purchase or condemn land for hospital and waterworks, to make regulations to secure the general health of the city, to enact ordinances for any of the above-mentioned purposes, and "for maintaining the peace, good government and welfare of the city and its trade and commerce." Also a section which gives to gas and water companies the power to manufacture and furnish gas and water and to lay down pipes and mains in the streets "with the consent of the municipal authorities thereof and under such regulations as may be prescribed," and a section giving power to such authorities "to contract with any such corporation for the lighting or supplying with water the streets, lots, lanes, squares and public places in any such city, town or village."

It is from these provisions that the water company deduces the power of the city to make the privileges granted exclusive, and special stress is put upon the provision of § 65, which we have quoted. Counsel say: "Language more explicitly expressing an absolute measure of power could hardly be framed. The power is given to light the streets, to make contracts for the lighting of the streets and to confer the privilege of lighting the streets for a specific term of years." And, further, counsel say: "It will be observed that the grant of power is to confer 'the privilege of furnishing light.' The definite article 'the' is used. Power to confer the privilege implies *ex vi termini*, the exclusive privilege, not a fractional or communal privilege. The privilege conferred exists as a concrete and integral whole, and therefore when conferred must pass in its entirety. The city possessed the privilege of lighting its own streets as a function of its municipal authority. It was that privilege in its integral and exclusive form which the legislature authorized the city to confer." We cannot concur. The kind of privilege is defined, not the extent of it. It is exclusive of some persons, but not of all. It is exclusive of those who have not a grant from proper authority. There are privileges which may exist in their full entirety in more than one person, and the privilege

or franchise or right to supply the inhabitants of a city with light or water is of this kind. A grant of power to confer such privilege is not necessarily a grant of power to make it exclusive. To hold otherwise would impugn the cited cases and their reasoning. It would destroy the rule of strict construction. The foundation of that rule requires the grant of such power to be explicit—explicit in the letter of the grant—or, if inferred from other powers or purposes, to be not only convenient to them, but indispensable to them. And these conditions are imperative—too firm of authority to be disregarded upon the petition of equities, however strong.

It is, however, contended that the statutes of Kansas fulfill the rule by the construction put upon them by the Supreme Court of the State, and the case is therefore brought, it is further contended, within the rule of *Vicksburg* v. *Vicksburg Waterworks Company*, 206 U. S. 496. The Kansas cases relied on are *Eureka Light & Gas Company* v. *City of Eureka*, 5 Kan. App. 669; *State* v. *The City of Topeka*, 68 Kansas, 177; *Cherryvale Water Company* v. *The City of Cherryvale*, 65 Kansas, 219. In those cases the court did say, in determining what duties were imposed or powers conferred upon the city, that the statute should be liberally construed to effectuate the general purpose of the legislature, but the powers under consideration were different from the powers herein involved, otherwise those cases would not be reconcilable with *Payne* v. *Spratley*, 5 Kansas, 525, 545, and *Mining Gas Company* v. *Gas Mining Company*, 55 Kansas, 175, 178. In *Payne* v. *Spratley* the general principles respecting the power of municipal corporations were said to be those which we have expressed. In *Mining Gas Company* v. *Gas Mining Company*, one of the companies, claiming an exclusive right, sought to test the validity of two city ordinances, granting the other the use of the streets and to restrict it from using the privileges granted. For this purpose the court said the plaintiff company clearly had no standing in court, because the city authorities alone were charged with the duty of preventing encroachment on the

streets, and they, alone, could test the validity of the ordinance. The court said further: "The city did not, in terms, attempt to give the plaintiff company a right to the exclusive use of the streets and lanes for the purpose of laying down its pipes. If it had attempted to do so it could not, for want of power."

The conclusion from these cases is reinforced by a change in the statutes conferring power upon the cities of the State. Section 65, *supra*, was § 30 of the statutes of 1868 (subds. 10 and 18, p. 162), and as such gave to a city the power to make the contracts therein expressed, and give "the exclusive privilege of furnishing gas to light the streets, lanes and alleys of said city for any length of time not exceeding twenty-one years." This provision was repeated in § 59 of the statutes of 1872, Kansas Laws, 1892, p. 211. But in 1885 that section was amended, so as to omit the words "the exclusive privilege." Section 7, chapter 99, Statutes of 1885, p. 147. And as thus amended it was reënacted in 1901. Section 1000, General Statutes of 1901.

Decrees affirmed.